TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 78

DAVID G. DIMICK, PETITIONER,

vs.

PETER SCHIEDT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 21, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in U. S. C. C. A., First Circuit	1	1
Caption .....(omitted in printing)..	1	
Record from D. C. U. S., District of Massachusetts	1	1
Writ of attachment and return	1	1
Declaration	2	2
Affidavit of service	3	2
Answer	4	3
Plaintiff's notice to admit facts	4	3
Plaintiff's motion that defendant be required to file a bill of particulars	5	4
Order allowing motion for bill of particulars	6	5
Defendant's bill of particulars	6	5
Defendant's motion for directed verdict	7	6
Verdict	7	7
Plaintiff's motion for new trial	7	7
Hearing on motion for new trial	8	7
Order on motion for new trial	8	7
Stipulation to increase amount of damages	8	8
Plaintiff's claim of exception	9	8
Judgment	9	9
Bill of exceptions	10	9
Caption	10	9

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—5516-C.

	Original	Print
Testimony of Peter Schiedt	10	9
Frank Stuart	14	13
George E. Lawrence	16	15
Theodore Chase	16	16
Wallace Olsen	18	17
Thomas Duffy	19	18
William Binford	20	19
Dr. Ray T. MacDonald	20	19
Dr. Francis D. Donoghue	23	22
Nicholas Stuhl	26	25
John J. Hayes	27	26
Samuel Jones	27	26
Martin J. Lane	28	27
Dr. Whitman King Coffin	28	27
Dr. John H. Hodgson	29	27
David Dimick	33	31
Dr. Harry R. Bolan	35	33
Recital as to exhibits	38	36
Order allowing bill of exceptions	39	37
Order allowing appeal	40	38
Assignments of error	40	38
Recital as to bond and citation	41	39
Clerk's certificate (omitted in printing)	41	
Opinion, Wilson, J.	43	39
Dissenting opinion, Morton, J.	51	47
Argument and submission	56	51
Judgment	56	51
Recital as to stay of mandate	56	51
Clerk's certificate (omitted in printing)	56	
Order allowing certiorari	58	52

[fols. a–1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 5144, Law Docket

PETER SCHIEDT, Plaintiff,

v.

DAVID G. DIMICK, Defendant

WRIT OF ATTACHMENT—Filed April 7, 1932

[L.S.] MASSACHUSETTS DISTRICT, ss:

The President of the United States of America, to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of David G. Dimick of the City of Portland, in the District of Maine, and a resident and citizen of said District, defendant, to the value of five thousand and no/100 dollars, and summon said defendant (if he may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Mas-
[fol. 2] sachusetts, on the fourth Tuesday of June. Then and there, in our said Court, to answer unto Peter Schiedt of the City of Boston, in the District of Massachusetts, and a resident and citizen of said District, plaintiff, in an action of tort. To the damage of the said plaintiff (as he says) the sum of five thousand and no/100 dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, JR., at Boston, the twenty-eighth day of March in the year of our Lord one thousand nine hundred and thirty-two.

Helen I. Tweedy, Deputy Clerk.

Officer's Return on Writ

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, March 30, 1932.

Pursuant hereunto I have this day attached a chip as the property of the within named David G. Dimick of the City

of Portland, in the District of Maine, and thereafter on the same day I summoned the within defendant to appear at court and answer as within directed by giving in hand to Morgan T. Ryan, registrar of motor vehicles for the Commonwealth of Massachusetts, at Boston, in said District, a true and attested copy of and an original summons to this writ, together with $2, his statutory fee for acceptance of service thereof.

W. J. Keville, United States Marshal, by John J. Carens, Deputy United States Marshal.

In United States District Court

Plaintiff's Declaration—Filed April 7, 1932

The plaintiff says that he is a resident and citizen of the Commonwealth of Massachusetts; that the defendant is a resident and citizen of the State of Maine, and that the matter in controversy exclusive of interest and costs exceeds three thousand (3,000) dollars.

Count 1. And the plaintiff says that on or about October [fol. 3] 31, 1931, while he was walking on Winthrop Street at or near Greenleaf Avenue, public highways in the City of Medford, in said Commonwealth, he was struck and knocked down by an automobile owned by the defendant and operated by and under the control of the defendant, his servants or agents. And the plaintiff further says that the defendant's automobile was operated in a careless and negligent manner, as a result of which he received severe injuries, suffered great pain of body and anguish of mind and was put to much expense for medicine, medical and hospital treatment, care and nursing, and was otherwise injured, all to his great damage, for the recovery of which he brings this action.

By his Attorneys.

Warner, Stackpole, Bradlee & Cabot.

In United States District Court

Affidavit of Service—Filed April 7, 1932

I, Charles G. Lewis, of counsel for the plaintiff in the above-entitled case, on oath depose and say that I have

complied with the law in obtaining service upon David G. Dimick, the non-resident defendant in this action, by leaving a copy of the process with a fee of two dollars ($2) in the hands of the registrar of motor vehicles for the Commonwealth of Massachusetts, the legally constituted attorney for the defendant; that I did then forthwith send by registered mail notice of such service upon said registrar and a copy of the process to the defendant at 439 Congress Street, Portland, Maine. The return receipt for said registered letter is hereto attached.

Charles G. Lewis.

COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss.

BOSTON, April 5, 1932.

Then personally appeared the above-named Charles G. Lewis and made oath that the foregoing statement signed by him is true. Before me,

CHARLES C. CABOT, *Notary Public.* [Seal.]

[fol. 4] Upon the filing of the writ and declaration herein, an order to plead was entered.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 3, 1932

And now comes the defendant in the above-entitled action and for answer to the plaintiff's writ and declaration denies each and every allegation contained therein.

And, further answering, the defendant says that the injuries or damage alleged were caused, in whole or in part, by the plaintiff's own negligence.

By his Attorney.

David H. Fulton.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S NOTICE TO ADMIT FACTS—Filed July 25, 1932

Take notice that the plaintiff in this case calls upon the defendant to admit for the purpose of this trial only the several facts respectively hereunder specified.

Warner, Stackpole, Bradlee & Cabot, Attorneys for the Plaintiff.

Boston, Massachusetts, July 21, 1932.

David H. Fulton, Esquire, 10 Tremont Street, Boston:

The facts, the admission of which is required, are:

1. On or about October 31, 1931 David G. Dimick was the owner of an automobile which was in collision with Peter Schiedt at or near the intersection of Winthrop Street and Greenleaf Avenue, public highways in the City of Medford and Commonwealth of Massachusetts.

2. On or about October 31, 1931 David G. Dimick was the operator of an automobile which was in collision with Peter [fol. 5] Schiedt at or near the intersection of Winthrop Street and Greenleaf Avenue, public highways in the City of Medford and Commonwealth of Massachusetts.

3. On or about October 31, 1931 David G. Dimick was the owner of an automobile bearing Maine registration number 112,333.

In United States District Court

Plaintiff's Motion that the Defendant Be Required to File a Bill of Particulars—Filed October 27, 1932

And now comes the plaintiff in the above-entitled case and moves that the defendant be required to specify:

1. The name and address of the owner of the automobile in which the defendant was riding at the time of the accident as set forth in the plaintiff's declaration.

2. The name and address of the operator of the automobile in which the defendant was riding at the time of the accident as set forth in the plaintiff's declaration.

3. The registration number, the date of registration and the state in which said automobile was registered in which the defendant was riding at the time of the accident as set forth in the plaintiff's declaration.

4. The operator's license number of David G. Dimick on October 31, 1931, the date it was issued and the state from which it was issued.

5. On whose business or for whose benefit was the said automobile being used in which the defendant was riding

at the time of the accident as set forth in the plaintiff's declaration.

6. Whether the defendant had the permission of the owner or person in control to use the automobile in which he was riding at the time of the accident as set forth in the plaintiff's declaration.

7. In what way the plaintiff was not in the exercise of due care at the time of the alleged accident.

[fol. 6] 8. What negligence of the plaintiff contributed to or was the cause of the injuries which he sustained as alleged in the defendant's answer.

By his Attorneys.

Warner, Stackpole, Bradlee & Cabot.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING MOTION FOR BILL OF PARTICULARS

At the same term, to wit, October 31, 1932, it was ordered by the court, the Honorable James A. Lowell, District Judge, sitting, no one appearing in opposition, that said motion for bill of particulars be allowed.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S BILL OF PARTICULARS—Filed November 22, 1932

1. The name and address of the owner of the automobile in which the defendant was riding is David G. Dimick, 439 Congress Street, Portland, Maine.

2. The name and address of the operator of the automobile in which the defendant was riding is as given in No. 1.

3. The registration number of the automobile referred to in Nos. 1 and 2 was Maine 112,333.

4. The operator's license was 33,672.

5. The automobile was being used on the business of the defendant.

6. The defendant was using his own automobile.

7. The plaintiff travelled from a place of safety into a place of danger in the path of the defendant's automobile, or so close to it that he was incurring undue risk, without using the care which a person of ordinary care would use to avoid risk and danger. This plaintiff stepped out with the defendant's automobile so close to him that he should have known that damage was likely to result to him from his conduct.

8. The negligence of the plaintiff is as set out in No. 7.
By his Attorney.

David H. Fulton.

[fol. 7] This cause was thence continued from term to term to the March Term, A. D. 1933, when, to wit, March 23, 1933, issue having been joined, a jury was duly empanelled to try the issue, the Honorable Hugh D. McLellan, District Judge, sitting.

On the twenty-eighth day of March, A. D. 1933, the following Defendant's Motion for Directed Verdict was filed and denied by the court, exception being saved:

In United States District Court

Defendant's Motion for Directed Verdict—Filed March 28, 1933

Now comes the defendant in the above-entitled cause and moves that the court instruct the jury that upon all the evidence the plaintiff is not entitled to recover and that the jury bring back a verdict for the defendant for the following reasons:

1. That there is no sufficient evidence that the defendant was negligent.

2. That there is no sufficient evidence that the plaintiff was in the exercise of due care.
By his Attorney.

Leo P. Doherty.

On the twenty-eighth day of said March, A. D. 1933, said case was committed to the jury, who, after hearing all mat-

ters and things concerning the same, returned the following Verdict:

IN UNITED STATES DISTRICT COURT

VERDICT—Filed March 28, 1933

The jury find for the plaintiff, and assess damages in the sum of $500 (five hundred dollars) no cents.

John A. Manning, Foreman.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR A NEW TRIAL—Filed March 29, 1933

And the plaintiff moves that the verdict returned by the jury be set aside and a new trial granted for the following reasons:

1. Because the verdict is against the evidence and the weight of the evidence.

[fol. 8] 2. Because the verdict is a compromise verdict and illegal.

3. Because the damages are inadequate.

By his Attorney.

Richard J. Cotter.

Also at the same term, to wit, April 5, 1933, said cause was set down for hearing on the foregoing plaintiff's motion for new trial, the Honorable Hugh D. McLellan, District Judge, sitting, and on the fourteenth day of April, 1933, the following Order on Motion for New Trial was entered:

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION FOR NEW TRIAL—April 14, 1933

McLELLAN, J.

On the authority of Gaffney v. Illingsworth, 90 N. J. L. 490, and Carr v. Miner, 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000

in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages.

Hugh D. McLellan, District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION TO INCREASE AMOUNT OF DAMAGES—Filed April 17, 1933

In accordance with the order of court herein made, with regard to new trial, the defendant files this stipulation, hereby consenting to an increase of one thousand dollars ($1,000) in the damages awarded, from the sum of five hundred dollars ($500) awarded by the jury to fifteen hundred dollars ($1,500).

David G. Dimick, by His Attorney: David H. Fulton.

[fol. 9] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S CLAIM OF EXCEPTION—Filed April 17, 1933

Now, comes the plaintiff and claims an exception to the order of the court handed down on April 14, 1933 in the above case, to wit:

"On the authority of Gaffney v. Illingsworth, 90 N. J. L. 490, and Carr v. Miner, 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages.

Hugh D. McLellan, District Judge."

By His Attorneys.

Warner, Stackpole & Bradlee, R. J. Cotter.

At the same term, to wit, June 5, 1933, a draft bill of exceptions was filed within extended time by the plaintiff. Said cause was thence continued to the present June

Term, A. D. 1933, when, to wit, August 22, 1933, a substituted bill of exceptions is filed by the plaintiff and allowed by the court.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, September 11, 1933, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that Peter Schiedt, plaintiff, recovered of the said David G. Dimick, defendant, the sum of one thousand five hundred forty dollars and seventy-five cents ($1,540.75) damages and interest, together with his costs of suit taxed at forty dollars and seventy-five cents ($40.75).

[fol. 10] IN UNITED STATES DISTRICT COURT

Plaintiff's Substituted Bill of Exceptions

Draft Bill Filed Within Extended Time June 5, 1933;
Substituted Bill Filed and Allowed August 22, 1933

This is an action of tort brought by Peter Schiedt to recover from David G. Dimick for personal injuries alleged to have been caused by the defendant's negligent operation of an automobile on a public way in the City of Medford in the District of Massachusetts. The plaintiff is a citizen and resident of the Commonwealth of Massachusetts and the defendant is a citizen and resident of the State of Maine. The matter in controversy, exclusive of interest and costs, is alleged to exceed three thousand dollars; the *ad damnum* of the writ is five thousand dollars. The writ, pleadings and photographs of the scene of the accident, which were admitted in evidence as "Exhibits 1", "6" and "7", are made part of this bill of exceptions and may be referred to as though specifically incorporated herein. The case was tried before a jury.

The following are all the facts material to this bill of exceptions:

The plaintiff, Peter Scheidt, testified that at the date of the trial he resided with his niece and her husband at 21

Orchard Street, Medford; and that on October 31, 1931, the day of the accident, he resided at 2 South Cedar Place, Boston. He had not worked since the end of June, 1931. He had worked as a cook at the Eastern Yacht Club for six seasons, at Housman's on Avery Street, Boston, for 10 years, and at the Locke Ober restaurant, Winter Place, Boston, for seven years, always as a cook. At the time of trial, he was 56 years of age and unmarried.

On Saturday, October 31, 1931, he went to 21 Orchard Street, Medford, to visit his niece, arriving before seven o'clock in the evening. The evening was dry, pleasant and dark. About 7.30 P. M. the plaintiff left his niece's house, walked along Orchard Street to Winthrop Street, which Orchard Street intersects at right angles. He crossed to the farther side of Winthrop Street, then walked along that side as far as the corner of Greenleaf Street. At that point he looked toward Winthrop Street, which was at his right, to see if there were any cars coming up; then he looked [fol. 11] ahead on Winthrop Street, toward the point where it intersected Boston Avenue; he looked down Greenleaf Street. There were no cars coming on any of these streets. He then took two steps and knew nothing more until he recovered consciousness in the hospital some time later that night. He never saw the car that struck him. He saw no cars coming in any direction on Winthrop Street or on Greenleaf Avenue. There was no horn—nothing to attract his attention as he stepped off the curbing of Greenleaf Avenue.

He remained at the hospital ten days, and could hardly sleep during that time because of pain in his right leg. This leg was broken and the pain ran from a place above the knee down the inside and outside of the back of the leg. He couldn't move the knee because of constant pain. He couldn't straighten out the leg. There were marks on the right side and top of his head, and a spot on his left knee. The pain continued when he was in bed at night and throughout the ten days while he was in the hospital.

From the hospital he returned to his niece's home at 21 Orchard Street. Nurses helped get him on to the elevator and then with Mr. Jones, his niece's husband, helped get him into Mr. Jones' car in which he was taken to Orchard Street. After leaving the hospital he was in bed for three weeks. The pain of the leg was so severe during all of that time that he was unable to sleep at all. At the hospital

the plaintiff was attended by Dr. Campbell who was attached to the hospital, and by Dr. MacDonald, his niece's doctor, who saw him three times there. Dr. MacDonald came to see him four or five times during the three weeks the plaintiff was in bed at his niece's home after he left the hospital.

Once during the three weeks he had a fainting spell while he was sitting up in the kitchen. In addition to that fainting spell, his head constantly felt dizzy. That continued to the time of trial, when he never had the feeling so bad, but if he moved his head a little bit it sometimes made him all dizzy for a second. This happened nearly every day, but not so that he would fall down. He could not remember things as fast as formerly; his weight was [fol. 12] at least fifteen pounds less than before. Outside of not being able to bend his right knee, he could not, up to the time of the trial, move four toes in his right foot. This affected his walking. The right foot was too weak to take a step like the left foot. He moved his right foot by pulling it along. He continued to see Dr. MacDonald often in the spring in April, going to his office at Boston Avenue, Medford. Dr. MacDonald used to bake the knee. The plaintiff last saw Dr. MacDonald in August, 1932. Dr. MacDonald then sent him to a Swedish masseuse, who had treated him twenty times.

By the time of the trial he could stand on his right leg for a short time—about half an hour—then it would begin to pain so that he would have to sit down. He had not gone back to work at the Locke Ober restaurant because he could not walk. There was no other work which he could do in the kitchen; you have to use your feet too much there. The plaintiff said that he had an opportunity to return to work right after he came back from the hospital. He has done nothing since and has made no money. When the plaintiff last worked as a cook, he earned $24 a week with three meals a day for six days a week.

The plaintiff pointed out on the photograph, which was admitted in evidence as "Plaintiff's Exhibit 1", Greenleaf Avenue and Winthrop Street, the side of Winthrop Street where he was walking just before the accident, the point where he was stepping off when struck.

A bill dated November 9, 1931 in the amount of $50 from the Lawrence Memorial Hospital (which was paid by the plaintiff) and bill dated January 16, 1932 in the amount of

$10 from the Lawrence Memorial Hospital, both of which had been paid by the plaintiff, were admitted in evidence as "Plaintiff's Exhibits 2 and 3". A bill dated December, 1931, Dr. Ray T. MacDonald, in the amount of $12 was marked as "Plaintiff's Exhibit 4". There was another bill from Dr. MacDonald for $60 which had not been paid. A receipted bill of Mrs. Gerda Harold, masseuse, in the amount of $40 was in evidence marked "Plaintiff's Exhibit [fol. 13] 5". By the doctor's orders, the plaintiff bought an elastic band for his knee which cost $4.50 and prescriptions costing $1.40.

On cross-examination, the plaintiff explained that Winthrop Street intersects Boston Avenue; that as one leaves Boston walking down Winthrop Street, Chester Road is the first street on the right, then Greenleaf Avenue on the right and then, a little further, Orchard Street on the left. At the time of the accident, the plaintiff was walking in the opposite direction on Winthrop Street from Orchard Street up toward Boston Avenue. The plaintiff testified that after leaving the curb at the corner of Winthrop Street and Greenleaf Avenue, he took one step and had not completed the second when he was struck. Just before crossing he was looking out for automobiles. He did not hear any horn. He said he did not take any notice of other persons at the corner of Greenleaf Avenue and Winthrop Street because he had his mind on cars and never notices anyone when he is out walking.

After the accident he came to in the hospital, the Lawrence Memorial Hospital. He was not operated upon there. He slept some in the hospital, not naturally. Whatever they gave him he did not know.

"X Q. 1. But you slept as a result of whatever they gave you?

A. I slept just short times; that was all.

X Q. 2. And you were in pain, I suppose, and you complained?

A. Well, I did not complain. I took it as it came.

X Q. 3. You did not complain of pain. Is that right?

A. Yes, sir.

X Q. 4. And did you ever complain of pain any time that you were in the hospital?

A. No; it is no use to complain. I thought the best way to get along was to keep quiet."

Before the accident he never had headaches except when he had a cold. Before the accident he wore glasses to read and for outside. He could see as well before the accident as now. If he wanted to see anything in a distance or see any kind of print, he wore glasses. He had not worn them for outside since the accident because he didn't have any [fol. 14] and didn't want to buy any since then. He had his glasses on the night of the accident. He had never fainted before the accident.

He told Dr. MacDonald there was something wrong with his toes, but not at the hospital. His leg was so stiff he could not tell just where it was. When Dr. Campbell was looking at his leg, he did not think it was necessary to tell him anything about it. That was why he was a doctor.

"X Q. 5. Well, you were getting pain, even though you did not complain of it, you say, in your toes at the time?

A. My whole legs pained. I did not know which one.

X Q. 6. But you did not complain about that to the doctor?

A. No, because the doctor is supposed to see what is the trouble with you."

The first time he told anybody about the toes was in the summer of 1932. When he saw that they were not coming around all right he told Dr. MacDonald.

When Dr. MacDonald had an office on Boston Avenue, plaintiff used to walk up to see him. He used to walk up the hill to see the doctor twice a week. It is not a steep grade. The doctor afterwards sent him over to Sterling Street, Somerville. This was half a mile from Orchard Street, Medford. He would take this walk of half a mile each way twice a week.

Business was slack at the Locke Ober restaurant during the summer. The plaintiff was an all around-cook, sometimes working at the range and sometimes at the broiler. He did not sit down doing his work. Everybody who worked in the kitchen had to be on his feet.

On redirect examination, the plaintiff testified that he had no trouble with his knee, no dizzy spells or no fainting spells before the accident.

Frank Stuart testified that about 7:30 P. M. on October 31, 1931, he was visiting Mr. and Mrs. Gale downstairs at

their house on the corner of Greenleaf Avenue and Winthrop Street. Exhibit 1 shows the house. There was to be a bridge game there that night, and other guests were expected. He was looking out of a side window at the corner [fol. 15] of the house and from that window he could see the corner of Winthrop Street and Greenleaf Avenue. He saw the plaintiff come walking up Winthrop Street to the corner of Winthrop Street and Greenleaf Avenue. The plaintiff took a step and was about to take a second when the defendant's car came around the corner, cut the corner sharply on the left and struck the plaintiff. Witness then jumped off the couch where he was sitting, told the others that there had been an accident, and went out half a minute or so after the accident. He did not see the defendant's car come to a stop before he left the window. He was unable to estimate the speed of the car. When he came out of the house he saw the car stopped on Greenleaf Avenue about fifty feet from the corner of Winthrop Street. He then saw the plaintiff, whom he had never seen before the time of the accident, propped up against the curbstone behind it. The plaintiff was in a dazed condition; he didn't know his name or where he was or anything like that. Two fellows came from the defendant's Ford car. Witness remained until the ambulance took the plaintiff away, then he went to the police station with Mr. Chase, and Mr. Olsen, two other men who were there. He couldn't say one way or the other what he observed about Mr. Dimick's condition. He did not talk with him. The witness rode to the police station in Mr. Dimick's car. He did not know who drove Dimick's car; he thought the fellow himself drove the car.

In cross-examination the witness testified that he did not tell the man at the desk at the station that he saw the accident. He didn't tell him that because he didn't want to get mixed up in it, that was all. The first one to whom he gave his name as having seen the accident was one of the lawyers that came down. He did not recall anyone saying to the police officer, "I saw the accident." He would not say that no one did say that. He testified further that he arrived at Mr. Gale's house about 5.30 or 6 P. M. The bridge party was to be about 8 or 8.30. He had his supper there. The accident occurred between 7 and 7.30. He finished supper about 6.15. After supper, about 6.30 or 6.45, he was setting up card tables around the house. At the time

[fol. 16] of the accident he had gone back into the dining room. He didn't know what brought him back into the dining room, he just went in and sat down, just gazing out the window for no reason at all. The window did not have curtains on it. He first saw the plaintiff about for or five feet from the curbstone at the corner of Winthrop Street and Greenleaf Avenue. The plaintiff was just passing from the dirt part of the sidewalk to the cement part as it appears in the photographs; he had just put one foot on the cement walk. Witness didn't see the automobile at that time, but he did see it at the time of the collision. It came up the hill toward Boston Avenue and made a left turn. He observed it came around the corner at a pretty fast rate of speed—twenty to twenty-five miles an hour.

"Witness. Yes, it hit him with the left front fender of the automobile.

X Q. 1. The left front fender?

A. Yes.

X Q. 2. What part of the fender struck him?

A. It was coming around the corner like this; right about there.

X Q. 3. In here some place?

A. Yes, up front here.

X Q. 4. But at least you start here behind the front of the fender in your illustration; that is correct, isn't it?

A. Yes."

He could not say whether or not the automobile stopped and then started again and then went over to the tree by the time he came out of the house.

George E. Lawrence testified that he was a commercial photographer; that at the request of the plaintiff's attorney he made photographs of the locality at the corner of Winthrop Street and Greenleaf Avenue. At that time, in addition to photographs, he made measurements of the width of the street. The width of Winthrop Street at the corner of Greenleaf, from curb to curb, is twenty-two feet, two inches. The width of Greenleaf Avenue is the same.

THEODORE CHASE testified that he witnessed the accident at about 7.20 or 7.30 P. M. on October 31, 1931. He was standing on the sidewalk on Winthrop Street just opposite Greenleaf Avenue. He and a companion were going to Mr. [fol. 17] Gale's house. He first saw the defendant's car coming up Winthrop Street when it was twenty or twenty-five feet from the corner of Greenleaf Avenue. There was no other traffic on the street. There was no other car coming from that direction, no cars going in any direction in that immediate vicinity. When he first saw the defendant's car it was coming up along the right-handside of Winthrop Street about thirty-five miles an hour. The car slowed down to about twenty to twenty-five miles an hour as it turned into Greenleaf Avenue. Witness stated he could just see plaintiff stepping off the sidewalk at the corner. The plaintiff took about a step and a half before he was struck. He could not see what part of the car came in contact with the plaintiff because the car itself cut out so that he couldn't see. The car stopped in the middle of the street and then went over by the tree; it went about fifty feet after it struck the plaintiff. Witness remained there fifteen minutes or more until the ambulance came. The plaintiff appeared to be in a daze; he kept asking where he was. Witness heard no horn from defendant's car.

On cross-examination the witness testified that he and Warren Olsen, his companion, were waiting to cross Winthrop Street at the time of the accident. They were side by side, waiting for the defendant's car to pass. He did not remember whether Olsen was on his left or right, but he remembered that defendant's car came up Winthrop Street from his left. There was nothing to block his vision, no other traffic on the road. He found glasses lying on the sidewalk on the left side of the street after the accident. Witness had a clear view down the street. It was not very dark, although the lights were on. When he observed the defendant's car to be going thirty-five miles an hour it was down by Orchard Street, thirty-five or forty feet distant. The defendant started slowing down at Orchard Street, but was almost at Greenleaf Avenue when he had slowed down to twenty-five miles an hour. Witness was facing directly toward Greenleaf Avenue. Greenleaf Avenue is about the same width as Winthrop Street.

[fol. 18] WALLACE CLSEN testified that he was employed at the Hobbs Bowling Alleys, Somerville, Massachusetts, and that he was with the last witness, Mr. Chase, on the night of the accident. It was Halloween night. He was going to the Gales' house to a card party. When he first saw the defendant's car, it was just below the next street down Winthrop Street, that is, Orchard Street, which is about forty feet from the corner of Greenleaf Street. Its speed was about thirty to thirty-five miles an hour. He watched it until the accident happened, because he was waiting to cross the street. He saw the plaintiff on the other side of the street at the corner. He saw the plaintiff look around to the left and to the right, and step off, taking one step, ready to take the next one, when the car swung around the corner. The car came along Winthrop Street and shot off quickly on an angle. It lessened its speed before it swung, until at the time of going across it was traveling twenty to twenty-five miles an hour. The car stopped seventeen to eighteen feet from where it struck the plaintiff. The men in the car got out and carried the plaintiff over behind the car. The plaintiff was propped up against the tree near the car after the accident. He was in a dazed condition and groaning; he was asking where he was. Witness heard no horn as the defendant's car took the turn.

Witness on cross-examination testified he heard the police officer ask if anybody saw the accident. He told the officer he saw it, but the officer did not ask for his name. He later gave his name at the station. He further stated that as he and Chase started to go across the street Chase was on his right at about a forty-five degree angle.

"X Q. 1. Come down here and show me how you were. You place yourself. Where was he standing? Assume this is Winthrop Street. How were you standing? Is this the way?

A. Like this.

X Q. 2. So that the other fellow is standing facing up Boston Avenue; you are about like that?

A. Yes.

X Q. 3. There is no doubt about these positions, is there?

A. No."

[fol. 19] The first time he saw Mr. Dimick stop was just beyond the corner.

THOMAS DUFFY testified that he was a police officer in the City of Medford on October 31, 1931, as well as at the date of the trial. He saw the defendant at the police station on the evening of October 31, 1931, and talked with him. He observed the defendant's condition. The defendant's breath smelled of liquor, his eyes were glossy, and his speech was unsteady and rather thick. His gait was noticeably unsteady. He talked to the defendant about the accident. He placed the defendant in a cell and did not see him thereafter.

On cross-examination, the witness testified that he and Officer Binford were the officers who arrested the defendant. He was very close to the defendant when he smelled the liquor. He went to him for the purpose of making a test of his breath; he asked the defendant to blow his breath so he could smell it. He asked the defendant questions which the defendant hesitated before answering. He asked the defendant if he was driving the car and the defendant hesitated a few seconds before saying that he was. He asked the defendant if he had been drinking and the defendant hesitated half a minute before answering "No."

"X Q. 1. Well, was he staggering now?
A. You wouldn't call it staggering. He was noticeable.
X Q. 2. In what way?
A. Why, in his movements.
X Q. 3. What was noticeable about his movements that led you to believe he was under the influence of liquor?
A. Well, he was not steady.
X Q. 4. In what way, swaying sideways, forward?
A. He wasn't swaying all over the floor.
X Q. 5. Well, was he swaying part way?
A. He was a little unsteady on his feet.
X Q. 6. Did he ever go from side to side or did he ever go forward or back or how?
A. Swaying, unsteady.
X Q. 7. Side to side, or what way was he swaying?
A. I don't know."

He did not prosecute him for driving under the influence [fol. 20] of liquor. It is a little over a mile from the scene of the accident to the police station.

WILLIAM BINFORD testified that on October 31 ,1931, as well as at the date of the trial, he was a police officer in the City of Medford. He remembered the defendant and his companion being brought into the police station October 31, 1931. On that night, he and Officer Duffy were motorcycle officers detailed at the station to await emergency calls. He saw the defendant, who was seated when the witness questioned him about the accident. The defendant's breath smelled strongly of liquor; his statements were incoherent; he was unsteady on his feet, swaying slightly. He was in a happy mood, laughing. When questioned he would hesitate and kind of laugh about it. He said, laughing, that he was going to a Halloween party.

On cross-examination, witness testified that he did not see Dimick brought in to the station. Dimick was turned over to the witness and Officer Duffy in the guard room. The defendant gave a report of the accident in the presence of the other officer.

"X Q. 1. There was nothing hesitant about what he did say, was there?

A. Yes, surely.

X Q. 2. He did?

A. Yes.

X Q. 3. Did he hesitate on all those various items?

A. On most all of them. He was in a happy mood, laughing all the time.

X Q. 4. Because he was in a happy mood, that wasn't the reason you drew any inference that he was under the influence of liquor, that in and of itself?

A. No.

X Q. 5. You didn't prosecute him for being under the influence, did you?

A. No."

DR. RAY T. MACDONALD testified that he had been a practicing physician in Medford for fourteen years. He had never treated the plaintiff before October 31, 1931. He had treated the plaintiff's niece. He was called to see the plaintiff at the Lawrence Memorial Hospital on November 2d by Mr. Jones.

He found the plaintiff lying in the hospital bed. When [fol. 21] the doctor was getting the history of the accident the plaintiff seemed a little slow and sluggish in his answers.

He was complaining of pain in both knees, but principally the right knee. There was ecchymosis of black and blue marks on both knees, but more so on the right. He was complaining of a great deal of pain in the right knee; had difficulty in making the motions of the knee which caused him pain. The plaintiff told him he had been struck by an automobile and didn't know about being brought to the hospital. Subsequently, he complained of pain in his head, an indefinite feeling in his head, and he seemed to be confused. He complained of his knee, a constant pain and difficulty in motion. The plaintiff gave the witness the symptoms about his head after he came home from the hospital. The witness diagnosed the injury to the right knee, with the help of the Xray, as being a fracture of the spine for the attachment of the crucial ligament of the right knee. There was a fracture of the joint of the knee. The doctor treated it by bandaging and by advising an elestic knee support. He advised the plaintiff to favor the knee all he could and for a while kept him in bed at home. He then got him up, thinking there would be less stiffness in the knee if he carefully let him regulate his motions in walking. The treatment ran down to December 28, 1931, the last time he saw the plaintiff at home.

In April, 1932 witness started baking the knee. The plaintiff was complaining still of the stiffness and pain in the knee and sort of lacking control. The doctor thought that there might be some adhesions or still some inflammatory condition in the joint that the heat would ease and would help him. In a fracture in a joint, there is likely to be more or less roughness and irritation which causes an inflammation, and this ligament in the plaintiff's leg probably was injured at the same time and would cause some pain and stiffness. The plaintiff told him that he would be walking and his leg would seem to give in; he couldn't seem to control it. That was something which, in the doctor's opinion, might or could follow from that injury. He baked the knee [fol. 22] for a while, but the plaintiff was still complaining of the pain and inability to stand the knee.

The doctor figured that he had done what he could, so he told the plaintiff he would like to have him try massaging and sent him to a masseuse. The last time the doctor saw him was August 3, 1932. At that time the doctor formed the opinion that the plaintiff's knee was permanently dam-

aged. This would consist of stiffness of the knee. The plaintiff seemed to hold the knee in a sort of semi-flexed position and he was unable to straighten out the joint to extend it. He judged the limitation to be one-quarter to one-third. His opinion was that there might be some improvement as to pain, but that the plaintiff had a permanently damaged knee that would be a bother to him for the rest of his life. He knew that the plaintiff's occupation had been as a cook.

Assuming the plaintiff's condition was the same as when he last saw him, he would say that the plaintiff couldn't do that type of work, being on his feet so much. The only kind of position he could hold would be one where he could sit down. During the time the plaintiff was under the doctor's observation, he complianed of pain in his head, said he couldn't think straight, seemed to be a little sluggish in answering questions. It took quite a little time to bring out to him the force of the question that you wanted to get at.

Assuming that the plaintiff had been knocked down by an automobile and thrown to the ground, that he received an injury to his head, and there was a mark on his head and pain at the hospital, and also black and blue spots on both knees, the witness would say that this condition in which he found the plaintiff was one of which the accident might be the adequate cause. From the history the doctor received of the head condition at the hospital, he formed the opinion that the plaintiff received a concussion of the brain at the time of the accident. The systems given the doctor, the dizziness and head condition described, were such as would follow the concussion. The accident described would be an adequate cause of the concussion. At the plaintiff's visit to the doctor on April 8, 1932, concerning the plaintiff's condition at night, he complained that his knee was still painful and stiff, that he could rest at night only on the right side. [fol. 23] The reflexes on that side were hyperactive, over-active.

On cross-examination, witness testified that when he saw the plaintiff on his return from the hospital, he found the reflexes on the right over-active. Then he examined plaintiff's heart and found that it was slightly enlarged.

"X Q. 1. Will you show me the notes that you used November 14 that say anything about reflexes exaggerated when you made that examination?

A. November 14, no, I have no notes.

X Q. 2. You have no notes. No; 40 *forty* days later you made an examination of him, didn't you? Then you found the reflexes over-active?

A. Apparently did.

X Q. 3. Have you got the notes for the 40 days later?

A. The only notes that are here are after he started coming to my office.

X Q. 4. So that you have no notes at all showing he had added reflexes until the following April?

A. No."

"X Q. 5. He is pale enough to cause you to believe that he was anemic to some degree?

A. I should figure if a man is suffering or confined in the home, is suffering, that he might be pale.

X Q. 6. But also, a man if anemic will have a look similar to the look he has right now; isn't that so?

A. With reservations, yes.

X Q. 7. If a man is anemic that produces weakness, doesn't it?

A. Yes.

X Q. 8. And weakness would produce dizzy spells, wouldn't it?

A. Yes.

X Q. 9. And trouble with the heart, if that is a chronic condition, would produce trouble with the brain, wouldn't it, to some degree?

A. Trouble with the brain, what do you mean?

X Q. 10. Dizziness.

A. Surely, in some of the heart conditions.

Francis D. Donoghue testified that he was a physician and surgeon, practising in Boston. He was graduated from Harvard Medical School in 1894, was private assistant of Dr. Samuel Mixter for ten years, was surgeon of the Boston Dispensary for 15 years, instructor in surgery, Tufts College, about the same length of time. During the last 25 [fol. 24] years he had been connected with the Industrial Accident Board of Massachusetts, two years as medical examiner and the rest of the time as medical adviser to the examiner. During that period he had carried on general surgical practice with various other appointments; and had represented the Commonwealth of Massachusetts by ap-

pointment of Governor Foss and the United States by appointment of Presidents Coolidge and Hoover.

Dr. Donoghue examined the plaintiff at the office of his attorney the day before trial. His examination was a general examination with special reference to the condition of the right knee. He found the plaintiff to be of poor color. The plaintiff gave a history of his occupation as a cook. He had the appearance of having lost weight. His pulse was slow, not strong, of poor quality, but regular. His heart was enlarged so that the apex beat was in the medial line. The heart sounds were weak but there were no murmurs that the doctor could determine. It was a general heart weakness. His mental attitude was the slow responding type, he hesitated in answers apparently both because of language difficulty and trying to think. There was no definite alteration in his reflexes. The right knee jerk was more active than the left and that was probably because his knee was partially stiff. There was no definite tipping over when he stood up and there was no other abnormal reflex. The question of the reaction of his eyes to distance was a little doubtful, but they reacted to light.

The examination of his knee showed the knee was held in a position of partial flexion; that is, the leg is bent and cannot be fully extended. When the knee is taken and pressure is great to bring it back, there is what is known as elastic resistance, that is, as though the thing that obstructed was not bone but was the type that comes from adhesions inside the joint. The result is that when the plaintiff walks he walks rather dragging his leg. It doesn't swing properly and there is evidence in the appearance of his shoes that he kicks the right toe as he walks. That is consistent with the stiffness of the knee. As to the reason why there were adhesions inside the plaintiff's knee, the [fol. 25] doctor's opinion was as follows: He received a history of an injury to the knee with fracture of the spine of the tibia. The ligament injured was the crucial ligament. Crucial means cross ligament. At the top of the shin bone, called the tip, as the shin bone comes up to the knee and that tip makes a bearing place for the thigh bone to rest on, there is a little bone on the outside that serves as an attachment or guide so the leg doesn't wiggle, but it has nothing to do with the bearing of the big bone in the leg on which you stand.

Below the knee is the other bone known as the fibula. On top of the shin bone are two pieces of bone sticking up, to which is attached a ligament. Attached to each of these pieces in the first place is the margin of a cartilage known as the semilunar cartilage, on either side of the top of the knee joint, so that the knee joint not only is a range joint, to and fro, but with the leg bent the lower part can be turned under near this cartilege. Taking the upper part of the leg, toward the thigh bone, on top of the shin bone there are what are known as crucial ligaments going up, caught on the thigh bone. These are known as crucial ligaments or cross ligaments inside of the knee to prevent lateral motion at the knee joint.

In the plaintiff's case apparently the anterior crucial ligament was broken off. In healing, so far as bony healing was concerned, it left adhesions that make this interference with the complete stretching, straightening of the plaintiff's leg. There is not much that a doctor can do with such a condition except to have him use the leg as far as he can to stretch out the adhesions as much as possible.

There was nothing in the plaintiff's history other than the accident which might be a cause of any of the conditions that the doctor found. As far as the plaintiff's work as a cook is concerned, his leg would feel tired if he stood on it any length of time. If he had a job where he could ease himself if the leg got tired he would be able to do a considerable amount of work as far as that leg is concerned. As far as the leg condition is concerned, he would be able to do a great deal. His general condition is poor. He has general weakness which is not due to his knee. It may be [fol. 26] associated with the result of the concussion or it may be associated with some other general condition.

The accident was sufficient to knock him out of his work and he is not able to get back into it. The knee and concussion of his brain incapacitated him for work. The plaintiff has a permanent disability of his leg. He cannot do any work except that which can be done sitting down; he would be handicapped for any work that called for being on his feet regularly. The rotation of the plaintiff's lower leg is limited about two-thirds. If there was lack of control, that would probably be due to the habit of not using the leg incident to the stiffness of the leg from the break in the joint.

Cross examination:

"X Q. 1. Doctor, would you say that this man is the picture of one being bothered with anemia?

A. Well, the picture of one being bothered is a difficult question to answer.

X Q. 2. Would you say he was?

A. I would say he probably was.

X Q. 3. You found a man that looked anemic to you probably, primarily or secondarily?

A. I wouldn't say he looks anemic. He has got a pallor that is entirely consistent with the work of a cook. If he wasn't a cook I would say he looked anemic. He has got the pallor of a cook.

X Q. 4. And that is the usual pallor that cooks have, is it?

A. Yes.

X Q. 5. That he has?

A. Yes, they do under the Volstead act."

NICHOLAS STUHL testified that he was manager of the Winter Place Hotel and had been there thirty-nine years. The plaintiff had worked for him there before the accident seven years or more. He was a cook and worked regularly. The plaintiff was laid off at the time of the accident because of seasonal slackness. In the fall, November, he wanted the plaintiff back because business began to pick up again. Before the accident the plaintiff was a *a* very handy man; he could be put anywhere, to broil, to roast, anywhere. He was quick in his movements, always running. His wage [fol. 27] was $24 a week, with all the meals he wanted. Since the accident he has noticed that the plaintiff can't get around, can't work.

On cross examination the witness testified that his business is seasonal, always slow in the summer, but increasing in the fall around November. At the time he laid off the plaintiff, he had also laid off three waiters, two women and another man in the kitchen. But he told the plaintiff he would take him back when the summer season was over. He had not sent for him up to October 31st. He would have taken him back because there were several chances up there, even if he would have had to let another man go to take him anyhow.

JOHN J. HAYES testified that he was a janitor at 2 South Cedar Place, Boston, and had rented a room there to the plaintiff for about ten years and that he had known the plaintiff for that time. He knew of the accident. In his opinion the plaintiff had the appearance of having aged ten years since the accident—he had grown delicate and old looking, and had lost weight. Every night for almost ten years the plaintiff had stopped in on the way home from work to talk and smoke with him. Now the plaintiff's mind is different, neither his mind nor his limbs seem to be as accurate as they were. He noticed the change in his mind in talking to him.

SAMUEL JONES testified that he resided at 21 Orchard Street, Medford; that he was the husband of the plaintiff's niece. The plaintiff did not live with him prior to October 31, 1931, but came to visit practically every Saturday to stay over Sunday. He was on a visit at the time of the accident and had lived with the witness since the accident. Witness and his wife were out shopping at the time of the accident and knew nothing about it until around eleven that night.

About that time he went to the hospital to see the plaintiff, who was in a very dazed condition. After the period when the plaintiff was in the hospital, witness took him home. Then he was in bed for a period. When the plaintiff first came home he wouldn't talk much—he seemed to be dazed [fol. 28] at first. You would ask him a question; he wouldn't answer, as though he hadn't heard; he would just sit and stare, in a daze. In fact, he was still that way at times. One Sunday in December, 1931, when the plaintiff rose from the chair in which he had been sitting in the kitchen, to go to bed, he fainted, falling against the wall.

The witness observed a change in the plaintiff since the accident, both in weight and mentally. The plaintiff was not as friendly as before. Sometimes he would go half a day without speaking as though angry. When witness said "Good morning" to him, maybe he would answer or maybe not for no apparent reason. The children in the house seemed to irritate him a great deal since the accident although before he used to go out walking with the children a great deal taking them up to the Mystic Lakes. Now any little noise—the children or the radio—would irritate him.

On cross-examination witness testified that before the accident the plaintiff used to think more quickly and more accurately.

Martin J. Lane testified that he lived at 17 Orchard Street, Medford, which is about two minutes walk from Greenleaf Avenue—about sixty-five or seventy-five feet. He had known the plaintiff about nine years prior to the accident. Witness was a clerk for the elevated. He knew the plaintiff well before the accident and had talked with him probably two or three times a week since. He noticed a difference in the plaintiff since the accident; he had lost a great deal of weight and had changed in his carriage and in his walk which was now dragging. Before the accident they used to hold quite a conversation; now the plaintiff would frequently come into witness' house and sit down. He would answer questions slowly, but wouldn't talk otherwise.

Dr. Whitman King Coffin testified that he is a physician, that he takes X rays in connection with his practice. He is roentgenologist at the Lawrence Memorial Hospital. At the request of one of the doctors at that hospital he took X ray pictures of plaintiff's right knee. The pictures were marked as "Exhibits 8" and "9". The X ray showed a [fol. 29] fracture through the attachment of one of the spines of the tibia to the tibia itself. This was the right knee. There was an X ray of plaintiff's skull which was negative.

Dr. John H. Hodgson testified that he is a physician and surgeon; that he has specialized in neurological surgery, which is the surgery of the brain and the spinal cord and the nerves. He was graduated from Harvard Medical School in 1915, had a surgical interneship at the Massachusetts General and Peter Bent Brigham Hospitals in Boston; was resident surgeon at the Massachusetts General Hospital before the war; was abroad two years during the war doing surgical work, first with the 14th Engineers, and then with the Massachusetts General Hospital Unit. After the war he came back as resident surgeon at the Massachusetts Gen-

eral Hospital for about a year and since that time has been on its visiting staff in the Department of Surgery and is now assistant visiting surgeon, associated in neurological surgery, which has to do with surgery of head injuries, brain tumors, etc., with Dr. Mixter, who is chief of that department. He is consultant at the Massachusetts Eye and Ear Infirmary and in numerous hospitals outside of Boston, such as the Lawrence Memorial, the Winchester and Chelsea Memorial as well as Arlington, Palmer Memorial in Boston, and others. He is on the faculty of the Harvard Medical School, and instructor in the Department of Surgery in the course for graduates.

He examined the plaintiff at his office December 24, 1932 with just plaintiff and himself present. He obtained a history of plaintiff's complaints, then made a general physical examination, and then, in addition, a neurological examination, which is an examination of the nervous system, in addition to the general examination that is ordinarily made.

Concerning the history of his complaints, plaintiff had no direct knowledge of just what happened but he understood afterwards that he was struck and knocked down by an automobile. He was rendered completely unconscious, but did not know for how long. On coming to, he was in the Lawrence Memorial Hospital in Medford and someone was try-
[fol. 30] ing to get his name and address. Everything seemed blank and he couldn't see. He remained at the hospital for about ten days. His memory was distinctly hazy for all these events. After leaving the hospital he went to the home of A. J. Jones of Medford and was attended by Dr. Ray T. MacDonald of Medford until July or August of 1932. Dr. MacDonald gave him baking treatments to the right leg. He was also treated by a Swedish masseuse about twenty times, the last time in November 1932. He hadn't worked since the injury.

Plaintiff then related his complaints. There was weakness in the right leg. Plaintiff stated he could not straighten the right knee and had no control of the right leg, whereas the left was all right. He used a cane constantly when out of doors. He complained of pain in the outer side of the right thigh. This pain went down the leg behind the knee and then down the outer side of the lower leg into the foot and the last three toes. It was a dull but not a constant pain. If he walked a little the leg got tired and heavy and began to pain. Plaintiff dragged the leg and it jumped a lot.

The leg never felt comfortable. Plaintiff could not rest it. Sometimes it would not move at all. Again, it would move when he did not want it to and he was not able to control it. However, he had walked as far as two miles some days. The pain in this leg formerly kept him awake at night, it still did, but not as often.

Plaintiff didn't sleep well and had to keep pulling the leg over to get comfortable. There was no numbness and no definite wasting of the muscles of the leg. The palms, hands and left leg were all right. There was no shaking of the hands. Plaintiff was right-handed. Vision was good. Plaintiff wore glasses for reading, as before the accident. He lost his glasses at about the time of the accident but was not sure whether he was wearing them or not. Hearing was about as good as before the accident. Plaintiff complained of a funny feeling through the right side of his head, down in back and above the ear. He did not consider this a headache exactly but rather a soreness. It has been present very much since the accident and has not changed in degree. [fol. 31] It worried the plaintiff at times. There was no generalized headache.

Plaintiff also complained of dizziness which has been present since the accident but remains the same in degree. It came mostly when he laid his head backwards and lasted several seconds. Plaintiff had it sometimes when he was standing up. Plaintiff did not have it very much, but sometimes twice in one day. A year ago plaintiff staggered towards the left and leaned against a door but did not fall. Otherwise there was no staggering or falling. His memory was not as good as before the accident; he now forgot easily. He had become unstable and nervous and the least thing now bothered him. He could not stand noise and wanted to be alone a great deal. He was now gloomy all of the time, but had not been before the accident. His appetite was poor and he had lost 20 pounds. There were no other complaints.

The plaintiff's past history was that he had always been well. He had had no serious illness previous to the accident, nor operations. He had pleurisy eight years earlier and had been home five days on account of it. Had no venereal diseases. The plaintiff was born in Lorraine and had been in this country steadily since 1893. He was a cook by occupation and had worked steadily until June or July 1931, but not between that date and the date of the accident because no work was then available. He had worked for a number

of years in the Winter Place Tavern; had never been laid off before and had been requested two or three times since being laid off to go back there to work. He smoked a pipe and did not use alcohol.

The doctor's physical examination revealed a fifty-five year old white single man who spoke English fairly well, slow to understand and to respond and seemed somewhat retarded mentally. He had a rather blank expression, was of medium height and at the time of the examination weighed 150 pounds. He was somewhat emotional at times and tears came to his eyes on one occasion. He walked very slowly and used a cane. He always dragged the right foot. The gait was abnormal. There was dragging of the right foot and the right leg shook a great deal sometimes.

[fol. 32] At times the right leg hung back and didn't come forward as it should. At times when he placed the foot down it stamped. He stated that he had no strength to pick up this leg. He got up from the chair slowly and held on to it to steady himself. He stated he was afraid to bear weight on the right foot. He bore his weight on the left leg, not much on the right, and the right knee was held in a slightly bent flexed position.

There was slight anxiety in the Romberg position, but no definite swaying. That is, when asked to stand straight with his feet closed together and his arms to his side and with his eyes closed, to see whether he was steady in that position as a normal person is, he seemed anxious, apprehensive lest he not be able to do it, but there was no actual swaying. There was no atrophy of the leg and no tenderness. The areas of pain described in the right leg were not tender, the complaint being subjective, that is, within himself, nothing objective to show for it in that respect, that is in tenderness at least.

There were moderate varicose veins in both lower legs. There was a fine tremor of the hands. Reflexes and sensations of all kinds were normal throughout the body; that is, reflexes in the right leg and in other part- of the body were present and normal. Neurological examination as a whole was negative. The witness made a diagnosis of his condition at that time. The plaintiff had received concussion of the brain at least of moderate degree and there might have been even greater injury than that, especially in view of his subsequent complaints.

He was retarded mentally, somewhat emotional and not clear as to what had happened to him, and did not seem to fully appreciate his condition since the accident. As a result of the symptoms he gave and the condition in which the doctor found him he formed the opinion that his complaints were in part due to the concussion; the complaints of headache and dizziness and the other symptoms referable to the head were the result of concussion. Of course, the leg condition was something else.

In an indirect way the concussion was responsible for the loss of weight. There was no connection between brain in- [fol. 33] jury and the injury to the leg, but the doctor formed the opinion that there was incapacity in that leg including the knee, which constituted a definite handicap. The leg condition was one of instability of the right knee. From the doctor's own opinion rather than from what plaintiff told him, he believed the plaintiff had been incapacitated right along from the date of the accident up to the time of the examination. The doctor felt that the disability which had lasted up to then was likely to go on indefinitely—for a long time.

On cross-examination the witness testified that whether or not the plaintiff was emotional before the accident he didn't know from observation, just from what the plaintiff told him.

"X Q. 1. Do you think, doctor, that he will be emotional after this case is over?

A. I should expect so; yes.

X Q. 2. Have you in your experience, doctor, found that injured people cease to be emotional when they know the impending matter is finished?

A. That sometimes happens, sir.

X Q. 3. But you say that would not apply to his case?

A. I felt that that was not a factor in his case; that he was emotional because of what happened and the way he felt rather than because there was a suit pending. I may be wrong but that was my impression of him."

The defendant, David Dimick, testified that he was twenty-two years old; that he had come from Portland to Medford on the day of the accident to see friend of Mr. Hanson who

was in the car with him. These people lived on Greenleaf Avenue, Medford. After he had been there, he went up to a store on Boston Avenue. After leaving the store he turned down Winthrop Street, and drove down that street until he was 20 feet from Greenleaf Avenue. He put out his hand and blew the horn. He was five or six feet from the curb. When he was 20 feet from Greenleaf Avenue his lights just about struck the plaintiff walking up the sidewalk. The plaintiff was just about to get on the cement part of the sidewalk. The defendant turned into Greenleaf Avenue just as the plaintiff stepped off the curb. The next thing the defendant knew he felt the impact. He didn't [fol. 34] know on what part of his car it was. It was in behind where he was sitting. The defendant stopped within about a car's length and pulled over to the side of the road, got out and went back to help the plaintiff, and walked over to his car with plaintiff, helped the plaintiff walk to his car. The officer who came with the patrol wagon told him to report immediately at the police station. The defendant then drove down to the police station.

On cross-examination the defendant admitted that he was the person who pleaded guilty and was found guilty and ordered to pay a fine of $35 for operating a motor vehicle negligently so that the lives and safety of the public might be endangered. He stated that he had not been drinking on the night of the accident, not a drink, not even a smell. He and his friend Hanson left Portland, Maine, that afternoon to go — the friend's house on Medford Hillside. He had a rough idea where the place was through discussing it with Hanson. Hanson was going to take him there. He did not know the people he was visiting at Greenleaf Avenue. There was a gentleman, his daughter-in-law and her husband. He reached the house from Portland about 7 p. m. He did not see or communicate with these people to have them come to court to testify for him. At the time of the accident, out of the corner of his eye, he saw the plaintiff take a step off the curbing. This was not backwards, after defendant had passed him. The plaintiff had taken a step off when the defendant reached the corner. At the time plaintiff walked into the rear of his car, defendant said, his front fender was just by the end where the crosswalk would be. The plaintiff left the sidewalk to come out toward the defendant. The defendant did not put on his power; he did

not stop. He thought plaintiff would hesitate; he did not think he would stop. Defendant continued at the same speed until he heard the jolt in the back.

"X Q. 1. Did you see these boys who testified this morning in court when you got out of your car and went over?

A. I wouldn't recognize them.

X Q. 2. There were some boys there, young men about your own age?

A. When I got out of the car?

[fol. 35] X Q. 3. Yes.

A. No, I didn't see them."

He assisted the plaintiff across the street to a place right up behind defendant's car. The officer's testimony that he laughed in answering questions was not true, nor was the officer's testimony that he was incoherent. He talked clearly. The officers were incorrect in saying that they smelled liquor on his breath.

In answer to questions by the court, the defendant said that each of the officers asked him if he had been drinking and in the presence of both officers, one asked him to blow out his breath and he did so. The day before trial the defendant rode down from Maine with Hanson, who was in the car with him on the night of the accident, but he did not bring him to court to testify. He did not know where Hanson was on the day of the trial. He saw him at the office of the defendant's attorney the day before the trial. He did not tell him to come to court. That was not the last time defendant saw him.

Dr. Harry R. Bolan, called by the defendant, testified that he was a practicing physician in Boston. He was a graduate of Middlesex College of Medicine and Surgery with two years' experience at Middlesex Hospital, special work in Massachusetts General Hospital and Bellevue Hospital, New York, New York.

He examined the plaintiff November 25th at his home. His diagnosis was cerebral concussion and a fracture of the small spine on the inner surface of the head of the tibia, contusion of the right knee. He examined plaintiff's heart and found at that time that plaintiff had a low pitch

systolic murmur of the heart over all the valve areas, but he thought that plaintiff's compensation was pretty good. His blood pressure was 135/75 millimeters of mercury; pulse was regular, fair volume. He would say the heart condition was one of long duration. That was all he found in regard to the heart. He found marked tenderness on the inner surface of the joint of the right knee, with pain on any flexion of the leg. At the time of his examination there were no external marks of injury on the knee or the leg; no scarring, no swelling. About one-third of the normal flexion of the leg was possible without too much pain. [fol. 36] Any motion was slightly painful. The plaintiff walked slowly and carefully, with the aid of a cane, with a marked limp. He could not detect any thickening of the underlying tissues. The doctor saw the X-ray which showed a crack just at the base of the small spine. The doctor made a second examination December 28th and found a fine tremor of both hands and exaggerated reflexes in the right leg. The doctor could obtain full flexion of the leg by exerting his own force on it. There was pain on full extension. The plaintiff still walked with a limp and used a cane.

At the time of his second examination, approximately nine weeks after the accident, the doctor thought the plaintiff could return to work in a month or six weeks.

On cross-examination the doctor testified that he had not seen the plaintiff since that time.

"X Q. 1. Is it common in a fracture of this sort to have adhesions after the healing of the fracture in the joint?

A. I would not say it was common; no.

X Q. 2. Is it uncommon? It is not uncommon?

A. It is not usual at all.

X Q. 3. It is not uncommon to see them?

A. I should say it was rather uncommon; yes.

X Q. 4. Would you say that, in this case, after the fracture healed that there could not possibly be adhesions that would interfere with the flexation of the knee?

A. Oh, adhesions are possible.

X Q. 5. So that it would not be a startling statement?

A. No."

At the time of his first examination flexation of plaintiff's leg was possible to the extent of about one-third of normal —in other words there was a restriction of two-thirds. The

doctor didn't think it would be of any advantage to make an examination between December 1931 and the date of the trial. Assuming that there were adhesions that interfered with the motion of that leg, they would not be very painful at the date of the trial. Perhaps they would be on forced flexation. It was too late to have much pain there. Forced [fol. 37] flexing would be attempting to break up those adhesions. The witness didn't think plaintiff had any pain at the date of the trial.

If there were adhesions and restricted motion at this time, whether or not they would continue indefinitely would depend upon the man's attitude towards his condition and as to how much he used the leg. If the adhesions have been there for a year it would take a little time to break them up and get adequate motion in the knee.

The doctor did not think that the time was past when it would be possible. He thought it would be fully possible if plaintiff would be willing to go through the exercises and take the proper form of treatment—he could get a little more adequate motion in the knee. He certainly did recommend to plaintiff the use of the knee. When plaintiff attempted to walk half a mile to Dr. MacDonald's that would be not at all contrary to the doctor's advice, but plaintiff took two hours to do it; there was the trouble. The doctor didn't think he pushed himself enough. He ought to hustle to give that knee all the action it possibly could get. If the adhesions were there, the doctor would say that after a year and a half there would be some doubt of their disappearing right away. The future as to that knee might be called somewhat indefinite. The prognosis would not be so very bad if he had the proper treatment.

In the two examinations he made he had confidence in the statements the plaintiff gave as to his condition. He did not think the plaintiff was feigning. As to the head injury, even a concussion of moderate intensity is very commonly followed by dizziness. The plaintiff reported dizziness to him. If plaintiff told him that the dizziness continued and occurred at the date of the trial—it would be a long time to think that dizziness would proceed for fifteen months after an injury. Of course the dizziness that plaintiff complained of was at the second, not at the first, examination. The dizziness sometimes occurs weeks but not years after the trauma application.

The date of the doctor's first examination was November [fol. 38] 26th and the second was December 28th. It was not surprising that plaintiff did not manifest dizziness on November 26th, twenty-six days after the accident. Headaches are also a result of concussion and the plaintiff told him he had them. He had heard plaintiff state in court that these headaches have continued. He would not expect that fifteen months afterwards. A headache due to ordinary concussion lasting fifteen months would be uncommon.

Up to within two or three weeks after the accident the results of a concussion or injury to the head would be uncertain. In that period you might get secondary symptoms. The duration of the symptoms is also something which cannot be predicted for a certainty. He wouldn't say that a slowing up of the mental condition naturally follows a concussion. The plaintiff did not tell him that he had difficulty with sleeping. Irregularity of sleeping might result from concussion. The plaintiff has lost a good deal of weight since the doctor examined him.

The plaintiff was of a sallow color when he saw him. From what the doctor saw, he would doubt that the plaintiff has the ability to get around as he probably has before the accident. It is very common that after there is a trauma, a blow which produces the concussion, that the patient when he is first seen directly after the accident has a hazy recollection of what happened; and that same hazy recollection continues whenever his attention is directed to the period directly after the accident.

On redirect examination the doctor testified that many factors enter into irregularity of sleeping. Fatigue will also come from leaky valves of the heart.

Recital as to Exhibits

Exhibits 1-10 inclusive, as follows, are made part of this bill of exceptions and may be referred to:

1. Photograph of locality.
2. Bill, Lawrence Memorial Hospital, November 9, 1931, $50.
3. Bill, Lawrence Memorial Hospital, January 16, 1932, $10.
4. Bill, Dr. Ray T. MacDonald, December 19, 1931, $12.

5. Bill, Mrs. Gerda Harold, $40.
6. Photograph.
[fol. 39] 7. Photograph.
8. X ray film.
9. X ray film.
10. Record of David Dimick in First District Court of Eastern Middlesex.

The above is all of the evidence material to the bill of exceptions.

The case was submitted to jury, which returned a verdict for the plaintiff in the sum of $500.

The plaintiff then duly filed a written motion for a new trial, a copy of which is annexed hereto, marked "A" and made part hereof.

After the motion for a new trial was duly argued by both counsel, the court made the order on motion for new trial, a copy of which is annexed hereto marked "B" and made part hereof.

The defendant then, within the time named in the order, filed the stipulation a copy of which is annexed hereto marked "C" and made part hereof.

The plaintiff duly claimed an exception to the said order, the copy of which is annexed, marked "D".

The plaintiff claiming that he is aggrieved by the said order hereinbefore referred to, now brings this his bill of exceptions and prays that it may be allowed.

By his Attorney.

Richard J. Cotter.

[Memorandum. Copies of motion for a new trial, order on motion for a new trial, stipulation and claim of exception, marked respectively "A", "B", "C" and "D" and attached to the original plaintiff's substituted bill of exceptions, are here omitted as they already form part of this transcript of record. James S. Allen, Clerk.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING BILL OF EXCEPTIONS

August 22, 1933. The within bill of exceptions is allowed.

Hugh D. McLellan, District Judge.

[fol. 40] Assented to.

Leo. P. Doherty, Attorney for Defendant. Richard J. Cotter, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

From the aforementioned judgment, a petition for appeal to the United States Circuit Court of Appeals for the First Circuit was filed by the plaintiff on the fifteenth day of November 1933, and allowed by the court on the same day.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 15, 1933

1. The court erred in making the order on plaintiff's motion for new trial that the motion should be denied if the defendant would file a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500 on or before April 21, 1933.

2. The court erred in denying the plaintiff's motion for a new trial upon the defendant's filing the stipulation required by the court's order on the plaintiff's motion for a new trial.

3. The court erred in denying the plaintiff's motion for a new trial based on the ground that the verdict found by the jury for the plaintiff in the sum of $500 was against the evidence and the weight of the evidence.

4. The court erred in denying the plaintiff's motion for a new trial based on the ground that the verdict found by the jury for the plaintiff in the sum of $500 was a compromise verdict and illegal.

5. The court erred in denying the plaintiff's motion for a new trial based on the ground that the damages found by the jury in the verdict of $500 for the plaintiff were inadequate.

6. The court erred in entering judgment for the plaintiff in so far as the amount of said judgment was determined

by the defendant's stipulation filed in accordance with the court's order on plaintiff's motion for new trial.

[fols. 41 & 42] Wherefore, the plaintiff prays that the judgment of the District Court may be reversed.

By his Attorneys.

Warner, Stackpole & Bradlee, R. J. Cotter.

RECITAL AS TO BOND AND CITATION

On the fifteenth day of November, 1933, a bond on appeal for costs in the sum of two hundred fifty dollars ($250) was filed by the plaintiff, the Globe Indemnity Company acting as surety, and said bond was approved by the court on the same day.

A citation on appeal was issued on November 15, 1933, being made returnable in the United States Circuit Court of Appeals on December 15, 1933. Service of said citation was duly acknowledged by counsel for David G. Dimick.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1933

No. 2884

PETER SCHIEDT, Plaintiff, Appellant,

v.

DAVID G. DIMICK, Defendant, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Wilson, Morton and Morris, JJ.

OPINION OF THE COURT—Filed April 20, 1934

WILSON, J.:

The plaintiff-appellant brought an action to recover for injuries caused by the alleged negligence of the defendant-

appellee in operating his automobile. The jury found that the defendant was liable and awarded damages in the sum of $500. The plaintiff filed a motion for a new trial on the ground of inadequate damages.

The trial judge denied the plaintiff's motion, the defendant having consented to a stipulation that judgment be entered against him for $1,500, or an increase in damages of $1,000 over that awarded by the jury. The trial judge based his rulings on the authority of two cases in the state courts: Gaffney v. Illingsworth, 90 N. J. L. 490, and Carr v. Miner, 42 Ill. 179.

But the issue is whether under the Seventh Amendment [fol. 44] of the Federal Constitution a federal district judge, in a common law action, may re-examine the facts and, against the protest of the plaintiff, deny a motion for a new trial by the plaintiff on the ground of inadequate damages, provided the defendant consents that judgment be entered for an additional sum fixed by the court.

Notwithstanding the great respect we have for the well-considered rulings of the judge presiding below, we think that the cases cited do not warrant the action taken in this case. The action in the case of Gaffney v. Illingsworth was based chiefly on a rule of the Supreme Court of New Jersey; and the case of Carr v. Miner was taken merely to correct an omission of a definite item of damage, as in the case of Clark v. Henshaw Motor Co., 246 Mass. 386. In any event, whatever may be the practice in the state courts, it is not sufficient ground for sustaining similar action in a federal court, United States v. Train et al., 12 Fed. 852; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291; Minneapolis, etc., Ry. Co. v. Moquin, 283 U. S. 520, 521, and the Seventh Amendment of the Federal Constitution, we think, prohibits such action in the federal courts.

The Seventh Amendment provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined by any Court of the United States than according to the rules of the common law."

Justice Story, in interpreting this Amendment in Parsons v. Bedford, 3 Peters 433, 446, 447, 448, said:

"The only modes known to the common law to re-examine such facts, are the granting of a new trial by the

court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law'."

[fol. 45] In the case of Capital Traction Company v. Hof, 174 U. S. 1, 7, the court said:

"A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that 'no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law,' had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States.

"This conclusion has been established, and 'the rules of the common law' in this respect clearly stated and defined, by judicial decisions."

The Supreme Court in the last cited case quoted with approval the language of Judge Sprague in United States v. 1363 Bags of Merchandise, 2 Sprague, 85, 87:

"'* * * at the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil causes that the court might, in its discretion, set aside a verdict. * * * because each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted."

Also see Liberty Oil Co. v. Condon Bank, 260 U. S. 235, 243.

The only federal statute relating to new trials is Sec. 726 R. S. as amended by Chap. 48, 40 Stat. 1181, 28 U. S. C. A. Sec. 391, which provides that:

"All United States courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law."

The remainder of the section, in view of the Seventh Amendment, can have no bearing on the issue now before this court, and the entire section is, of course, limited by the prohibition contained in the Seventh Amendment.

While at the time of the adoption of the Federal Consti- [fol. 46] tution, when the ground for a new trial was excessive damages, there were authorities in the early English common law courts holding that a new trial might be granted on the ground of excessive damages, Blackstone's Com., Vol. 3, p. 388-392; but the practice of denying a motion for a new trial on this ground, if a remittitur was filed by the plaintiff, does not seem to have become firmly established in England except by consent of both parties; Leeson v. Smith, 4 Neville & Manning's Rep. 304, 306; Watt v. Watt, Appeal Cases, 1905, p. 115; also see 2 Am. & Eng. Ann. Cases, 672 (a decision by the House of Lords).

In any event, we have been referred to no English case, nor has one been found after a somewhat extensive research, in which it has been held that, in case of inadequate damages, a new trial may be denied, provided the defendant consents to have judgment entered for a larger amount —fixed by the court—than the verdict of the jury. Ducker v. Wood, 1 T. R. 277; Hewlett v. Cruchley, 5 Taunt. 277; Duberley v. Gunning, 4 T. R. 651; Chambers v. Caulfield, 6 East. 244; Harry v. Watson, cited 4 T. R. 659, 660; Fabrigas v. Mostyn, 2 Sir W. Blackstone's Reports 929; Cuming v. Sibly, 4 Burr. 2489; Phillips v. South Western Railway Co., 4 Q. B. D. 406.

The case of Belt v. Lawes, 12 Q. B. D. 356, in which it was held that a motion for a new trial might be denied, if a remittitur was filed, was later considered and overruled in Watt v. Watt, supra (which also involved a reduction of excessive damages), in which case the Earl of Halsbury said at page 119: "My Lords, I am unable after a very anxious examination of the earlier authorities to assent to the legality of this proceeding unless by the assent of both parties. * * * Hesitating, as I do, to differ from the opinion expressed by my noble and learned friend Lord Lindley, I have come to the conclusion that there is no

power in the court to alter the verdict except by ordering a new trial. * * *"

The case of Watt v. Watt was cited in Lionel Barber & Co. v. Deuche Bank, Appeal Cases (1919) 304, 314-5, as establishing the rule that, according to the English common law, the defendant is entitled to insist that the case be re-heard by another jury, and that excessive damages can- [fol. 47] not be reduced except by consent of both parties. Reference to a prior practice where the issue was not raised cannot, of course, control carefully considered opinions by the House of Lords.

However, the practice of denying a motion for a new trial, in case of a remittitur being filed, was early recognized in the federal courts, following, no doubt, the practice in some of the lower English common law courts, as it was understood at the time of the adoption of the Constitution; Blunt v. Little, 3 Mason, 102; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69; Kennon v. Gilmer, 131 U. S. 22, 29; and while in case of a clear omission of some definite item of damage, certain state courts, to avoid the expense of a new trial, have ordered judgment for an amount that will include the omitted item, as in Carr v. Miner, supra; James v. Morey, 44 Ill. 352; and Clark v. Henshaw Motor Co., supra, it has never been held by any federal court that a motion by a plaintiff for a new trial on the ground of inadequate damages, where the damages were unliquidated, could be properly refused, provided the defendant consented to have judgment against him for a larger sum—determined by the court—than that awarded by the jury.

Granted that the Seventh Amendment does not require that old forms of practice and procedure be retained to preserve the right of trial by jury according to the rules of the common law, Walker v. New Mexico & Southern Pac. R. R. Co., 165 U. S. 593, 596; that it does not prohibit the introduction of new methods for determining what facts are actually in issue; that it does not prohibit the introduction of new rules of evidence, or that new devices may not be used to adapt the ancient institution to present needs to make of it an efficient instrument in the administration of justice; and that such changes are essential to the preservation of the right; the limitation imposed by the Amendment does require that enjoyment of the trial by jury shall not

be obstructed, and that the ultimate determination of issues of fact by the jury shall not be interfered with. Ex Parte Peterson, 253 U. S. 300, 309-310.

[fol. 48] The determination of damages may be submitted to arbitration, but only by consent of both parties; and in case of default the court may assess damages or refer the question to assessors; but where one of the parties has asked for a jury trial no fact found by a jury can be re-examined in a United States court except in accordance with the Seventh Amendment.

That issues of fact must be submitted for determination by a jury with such instruction and guidance by the court as will afford opportunity for that consideration by the jury which was secured to litigants by the rules governing trials at common law, is not a matter of form, but of right. Gasoline Products Co. v. Champlin, 283 U. S. 494, 498. Beyond changes in forms of practice and procedure from those followed in jury trials at common law, the federal courts have never approved any departure that in the final analysis in any way impaired a litigant's right to have a jury in a common law action weight the evidence and determine the facts.

Limitations upon the powers of the trial court under the Seventh Amendment over the verdict of a jury, have been defined by the Supreme Court in Slocum v. New York Life Ins. Co., 228 U. S. 364; Young, Adm'x, v. Central R. R. Co. of New Jersey, 232 U. S. 602; Capital Traction Co. v. Hof, supra; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642; Minneapolis, etc., Ry. v. Moquin, supra; Fairmount Glass Works v. Cub Fork Coal Co. et al., 287 U. S. 474, 485; also see United States v. Train, supra; Hughey v. Sullivan, 80 Fed. 72; Moran v. Washington Ry. & Elec. Co., 49 Fed. (2d) 679.

The statement in the opinion in Arkansas Valley Land & Cattle Co. v. Mann, supra, page 74, that the authority of a trial court to determine whether the damages are excessive, implies authority to determine when they are not of that character, obviously cannot be construed as definitely holding, or even implying, that in case of inadequate damages the trial court has the power to determine an amount that is not inadequate, if in excess of that awarded by a jury. The language in the Arkansas Valley Land & Cattle Co. case clearly refers only to the power of a trial court to [fol. 49] fix the maximum amount that is not excessive,

when a jury upon an examination of the facts has awarded a larger and excessive amount.

In the case of an excessive verdict, and the trial court refuses to grant a new trial on motion of the defendant, provided a remittitur is filed by the plaintiff, the denial of a defendant's motion is sustained on the ground that he is not prejudiced, because the judgment entered is for a less amount than a jury has already found against him; but when the damages awarded by a jury are clearly inadequate, and the plaintiff's motion for a new trial on that ground is denied, provided the defendant consents to have judgment entered against him for an increased amount fixed by the court, although the plaintiff recovers more than the award of the jury, he is thereby denied the right to have a jury pass on the amount of his actual damages. In the first case a jury has already awarded a sum in excess of that fixed by the court as a basis for a remittitur, which, at least, finds some support in the early English practice; while in the second case no jury has ever passed on the increased amount, and the practice has no precedent according to the rules of the common law.

In order to avoid the prohibition of the Seventh Amendment, the burden, we think, is on the party seeking to sustain an alteration of a jury's verdict by a federal judge to show that it is "according to the rules of the common law." Such a practice cannot be sustained merely because, in the case on trial, it may seem to the trial court to advance the cause of justice, end litigation and lessen the expense, if it impairs the right of trial by jury as established in the common law courts of England at the time of the adoption of the Constitution and the Seventh Amendment.

If the plaintiff in this case was entitled to recover, he was obviously entitled on the evidence to recover more than $500 for pain and suffering, loss of wages, and expenses of treatment in effecting a recovery; but, as there was some evidence tending to show that the plaintiff was guilty of contributory negligence, the inadequate verdict may well have been due to a compromise among the jury. If so, a new trial was clearly the only proper remedy.

The Supreme Court in Minneapolis, etc., Ry. Co. v. [fol. 50] Moquin, supra, held that if the excessive damages were due to passion, bias or prejudice, no remittitur can be filed, since, as the court said:

"In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

The federal courts have no authority to order a judgment for one party when the jury has found a verdict for the other, or what was termed in the ancient practice a judgment non obstante veredicto. Young, Adm'x, v. Central R. R. Co. of New Jersey, supra.

For the trial court to limit the amount of damages a plaintiff can recover in addition to those found by the jury, even with the consent of the defendant, is as much a usurpation of the prerogatives of the jury and a violation of the Seventh Amendment as in the case of awarding a verdict non obstante veredicto, especially when the damages are unliquidated.

The Wisconsin courts appear to have adopted such a practice in case of inadequate damages; but, as has been pointed out, the practice in this respect in the states cannot control in the federal courts. Since we have been referred to no other cases, either state, federal or English, than those above referred to, in which such a practice is approved, and since such an exhaustive work on federal procedure as Hughes' Federal Practice makes no reference to such a practice in the federal courts, and as the granting of a new trial fully preserves the rights of both parties, it leads us to conclude that there is no necessity, or sound basis, for such a departure from the rules of the common law.

The judgment of the District Court is reversed with costs, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION, MORTON, J.—Filed April 20, 1934

MORTON, J. (dissenting):

I regret that I am unable to agree and, as the question is of some general importance, I will state my views.

The essential facts are simple. The plaintiff sued the defendant at law to recover damages for personal injuries, and obtained a verdict. He regarded the verdict as much too small, and moved to set it aside on the ground of inadequacy of damages. The trial judge made an order that, "If the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages." The defendant filed the stipulation called for, and judgment was duly entered thereon.

The plaintiff has appealed, and contends: (1) that the District Judge exceeded his authority in giving the defendant the election to avoid a new trial by stipulating an increase in damages; (2) that the order should stand as one granting a new trial.

It is argued that the order was invalid, both at common law, and under the Seventh Amendment to the Constitution. The Seventh Amendment reads as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

It occasionally happens that in assessing damages a jury returns an amount beyond any figures which could be reached upon a fair and reasonable consideration of the case. In that event it becomes, under our practise, the duty of the trial judge to set the verdict aside, unless the plaintiff elects to reduce it by a remittitur to a just figure stated by the judge. The use of remittiturs implies power in the trial judge to determine the upper limit of reasonable

damages—as was clearly pointed out in Arkansas Valley Company v. Mann, 130 U. S. 69, s. c. 51 L. R. A. n. s. 863. [fol. 52] There is a lower limit to reasonable damages as well as an upper one; and this is equally for the trial judge to determine. On the lower side, the question is somewhat complicated by the possibility that certain jurors might have yielded doubts as to liability in view of a small award on damages, who would not have yielded their doubts if the damages had been larger. See Fairmount Glass Wks. v. Cut Fork Coal Co., 287 U. S. 474, 475. We need not concern ourselves, however, with this aspect of the matter because the defendant has accepted the verdict on liability and has stipulated that the damages might be increased. We are dealing only with objections by the plaintiff to the order which was made.

In the remittitur cases, the intention of the jury is assumed to be to give the highest damages legally permissible. The trial judge, in effect, names that figure, and gives the plaintiff an election to accept it. I cannot see why the same principle does not apply when the damages found by the jury are below the minimum reasonable amount, nor why the trial judge may not state the minimum reasonable figure—as he admittedly may state the maximum one—and give the defendant the election of paying it or submitting to a new trial. In each instance the verdict is accepted as to liability and the intention of the jury as to damages is given effect as far as legally permissible. In neither instance is the amount of the damages determined by the jury. But this does not prevent remittiturs and, as I have said, I can see no distinction affecting the powers of the trial judge, between them and the order made in this case—which might perhaps be termed an "additur". In the majority opinion remittiturs are distinguished on the ground that the defendant "is not prejudiced, because the judgment entered is for a less amount than a jury has already found against him." But it is not explained in what way the appealing plaintiff is prejudiced who receives more damages than a jury has found for him. I cannot see this distinction—on which in the last analysis the majority decision rests—nor do any of the English judges appear to have recognized it. On the contrary the Court of Appeals explicitly refer to reducing a verdict or increasing it [fol. 53] by action of the trial judge, as resting on the same

legal foundation. Both had been done in England until both were outlawed by the Watt (1905 A. C. 115) case which, although quoted from in the majority opinion, is clearly not the law of the Federal Courts. Arkansas Valley Co. v. Mann, supra, and cases cited below.

In Belt v. Lawes, 12 Q. B. D. 356, in the Court of Appeal Lord Esher says, "the Court has power to refuse a new trial without the consent of the defendant, on the plaintiff's consenting to the amount of the damages being reduced to such an amount as, if it had been given by the jury, the Court would not have considered excessive. * * *"

He then adds, "Suppose a case in which a new trial should be moved for on behalf of the plaintiff, on the ground that the amount of damages which the jury had given was obviously unreasonably too small"—exactly the present case—"I am far from saying that the Court would not have power in favour of the defendant, and in his interest, to say that the damages given are too small, but that if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused." The other justices Baggalley and Lindley concurred in these views. With respect to the practice thus approved, Lord Davey says in Watt v. Watt, "I do not doubt that such orders (remittiturs) have been frequently made, but they have not been challenged, and in the vast majority of cases the defendant is well advised to submit to a verdict for the reduced amount rather than incur the risk and expense of a new trial. Nor do I doubt that the power (if it exists) would be convenient, and in the most cases do substantial justice and save expense." In Fleming v. Bank of New Zealand, 1900 A. C. 577, the jury returned a verdict for the plaintiff for two thousand pounds. The Judicial Committee of the Privy Council decided "that a new trial ought to be directed unless the plaintiff consented that the damages shall be reduced to five hundred pounds," etc.; that is, they used a remittitur in their final judgment. Watt v. Watt in outlawing remittiturs was at variance not only with Belt v. Lawes, and with the commonly accepted practice of [fol. 54] many years, but also with the considered judgment of the Privy Council in the then recent Fleming case, supra. It also ran counter, as Lord Davey frankly admitted, to practical convenience in doing substantial justice and sav-

ing expense. However, as Watt v. Watt does not represent the law in the Federal Courts it is unnecessary to extend the discussion.

As the propriety of remittiturs in the Federal Courts is established (Tevis v. Ryan, 233 U. S. 273, where judgment entered on a remittitur was affirmed; Denny v. Pironi, 141 U. S. 121, 126; Arkansas Valley v. Mann, supra; Copley v. Ball, 176 Fed. 682, 692 (C. C. A.) plaintiff allowed remit as to land in ejectment suit), it seems to me to follow the order appealed from was not beyond the discretionary power of the trial judge. Clark v. Henshaw Co., 246 Mass. 386; Adamson v. County of Los Angeles, 198 Pac. Rep. 52. The way in which he dealt with the matter was direct and accomplished practical justice. These are weighty considerations on a question of practice, and ought not to be disregarded except for compelling reasons. I do not think that the Constitution prohibits improvements in the machinery for administering justice or restricts our procedural methods to those in use in the days of hand-looms and sailing ships. That view was strongly—and I believe rightly—repudiated in the Arkansas Valley Co. case, supra, and Walker v. Southern Pacific Railroad, 165 U. S. 593, 596. Cases like Shanahan v. Boston and Northern Street Railway, 193 Mass. 412, in which the finding of the jury on liability was disregarded by the trial judge in an effort to impose his views on the parties have no bearing on the present question. Here the trial judge accepted the jury's verdict as to liability. The part of his order which is objected to relates only to damages. The law recognizes a distinction between questions of liability and amount of damages, e. g. agreements for arbitrating the former were at one time regarded as against public policy, but agreements for the arbitration of damages were held valid. In the 17th and 18th centuries judges appear to have exercised great freedom in dealing with damages found by a jury. See Buller's Nisi Prius, 7th edition (1817) p. 21 (a). On the historical aspects of the question the cases, stated [fol. 55] in this book and in the earlier edition of it dated 1772, wherein damages in tort found by a jury were increased by judicial order, are interesting. They tend to support the views of the Court of Appeals and the Privy Council—and of the United States Supreme Court—as to the discretionary powers of the court over damages at com-

mon law. See Watt v. Watt, 1905 A. C. 115, at 119. In my opinion the judgment appealed from ought to be affirmed.

[fols. 56 & 57] In United States Circuit Court of Appeals

Argument and Submission

On January 17, 1934, this cause came on to be heard, and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

In United States Circuit Court of Appeals

Judgment—April 20, 1934

This cause came on to be heard January 17, 1934, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, April 20, 1934, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and with costs, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court,

Arthur I. Charron, Clerk.

Recital as to Stay of Mandate

Thereafter, to wit, on May 14, 1934, mandate was stayed until further order of court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,706. U. S. Circuit Court of Appeals, First Circuit. Term No. 78. David G. Dimick, Petitioner, vs. Peter Schiedt. Petition for a writ of certiorari and exhibit thereto. Filed May 31, 1934. File No. 78, O. T., 1934.

INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI	1
Statement	2
The question presented	3
Specification of errors to be urged	4
Reasons relied on for the allowance of the writ	4
BRIEF IN SUPPORT OF PETITION	5
I. Opinion below	5
II. Jurisdiction	5
III. The question presented	5
IV. The statutes involved	7
V. Argument	7

AUTHORITIES CITED.

Denny v. Pironi, 141 U.S. 121	9
Fairmount Glass Works v. Cub Fork Coal Co. et al., 287 U.S. 474	8
Judicial Code, 240 (a), amended by Act of February 13, 1925	5
Seventh Amendment to the Constitution	7

Supreme Court of the United States.

OCTOBER TERM, 1934.

No.

DAVID G. DIMICK,

PETITIONER,

v.

PETER SCHIEDT,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

Your petitioner respectfully submits the following petition for writ of certiorari, and prays that the same may issue to review the order of the United States Circuit Court of Appeals for the First Circuit, entered April 20, 1934, reversing an order of the District Court of the United States for the District of Massachusetts entered April 14, 1933, in which the judge of the said District Court disposed of a certain motion for a new trial, filed by a plaintiff in an action for personal injuries, by ordering that if the defendant should file a stipulation consenting to an increase in the amount of damages as found by the jury, then the plaintiff's motion for a new trial was to be denied.

Statement.

The case of *Peter Schiedt, plaintiff*, v. *David G. Dimick, defendant,* No. 5144 on the Law Docket of the District Court of the United States for the District of Massachusetts, being a claim for injuries alleged to have been sustained while the plaintiff, as a pedestrian, was crossing a public highway in Medford, Massachusetts, was tried before a jury and a verdict returned March 28, 1933, for the plaintiff in the sum of $500.

On March 29, 1933, a motion for a new trial was filed by the plaintiff, setting forth the following reasons:

> "1. Because the verdict is against the evidence and the weight of the evidence.
> "2. Because the verdict is a compromise verdict and illegal.
> "3. Because the damages are inadequate."

On this motion the Court entered the following order:

> "April 14, 1933. McLellan, J. On the authority of *Gaffney* v. *Illingsworth,* 90 N. J. L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages."

On the 17th day of April, 1933, the following stipulation, consenting to increase in the amount of damages awarded, was filed:

> "In accordance with the order of court herein made, with regard to new trial, the defendant files this stipu-

lation, hereby consenting to an increase of one thousand dollars ($1,000) in the damages awarded, from the sum of five hundred dollars ($500) awarded by the jury to fifteen hundred dollars ($1,500)."

The plaintiff in the said action, on April 17, 1933, filed a claim of exception to the order of April 14, 1933.

September 11, 1933, judgment was entered in behalf of Peter Schiedt in the sum of $1540.75 damages and interest, together with costs of suit taxed at $40.75. The plaintiff filed a substitute bill of exceptions, which was filed and allowed August 22, 1933, and duly entered in the United States Circuit Court of Appeals for the First Circuit August 22, 1933. The plaintiff also filed a petition for appeal to the said Circuit Court on the 15th day of November, 1933, and an assignment of errors, setting forth in substance that the Court erred in its order of April 14, 1933.

The case was duly set down for argument in the Circuit Court and was there argued by counsel, and on April 20, 1934, the said Circuit Court ordered that, "the judgment of the District Court is reversed with costs and the case is remanded to that Court for further proceedings not inconsistent with this opinion." The said opinion of the Court was a divided opinion. Wilson and Morris, JJ., being the majority, and Morton, J., submitting the dissenting opinion.

The Question Presented.

The sole question here presented is whether a judge of the District Court has the power to make an order denying a plaintiff's motion for a new trial, based in substance upon inadequacy of damages, upon a stipulation for increase in the amount of damages having been filed by the defendant in an amount suggested by the Court.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred—

1. In holding that there was any requirement of the Seventh Amendment to the Federal Constitution preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

2. In holding that there was any requirement at common law preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

3. In holding that the action of the Federal District Judge in this case amounted to a re-examination of the facts.

Reasons Relied on for the Allowance of the Writ.

The case presents a question of practice in the Federal Courts of great importance both to the bench and to the bar which has not been passed upon by this Court. It can hardly be denied that the exercise of such power in the hands of a conscientious Court might, at times, "advance the cause of justice, end litigation and lessen the expense."

Wherefore your petitioner respectfully prays that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit be granted.

LEO M. HARLOW,
DAVID H. FULTON,
For Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1934.

No.

DAVID G. DIMICK,

PETITIONER,

v.

PETER SCHIEDT,

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINION BELOW.

The opinion below is not yet reported.

II. JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

III. THE QUESTION PRESENTED.

The petitioner feels that the question presented cannot be better expressed than in the language used by Morton, J.,

at page 51 of the record, where the learned judge spoke as follows:

> "The essential facts are simple. The plaintiff sued the defendant at law to recover damages for personal injuries, and obtained a verdict. He regarded the verdict as much too small, and moved to set it aside on the ground of inadequacy of damages. The trial judge made an order that, 'If the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages.' The defendant filed the stipulation called for, and judgment was duly entered thereon.
>
> "The plaintiff has appealed, and contends: (1) that the District Judge exceeded his authority in giving the defendant the election to avoid a new trial by stipulating an increase in damages; (2) that the order should stand as one granting a new trial.
>
> "It is argued that the order was invalid, both at common law, and under the Seventh Amendment to the Constitution. The Seventh Amendment reads as follows:—
>
> " 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' "

The question, accordingly, is whether or not a trial Court, upon a motion for a new trial brought by a plaintiff who has

recovered damages, but is dissatisfied with the amount of the damages, can avoid the expenditure of time and money required by a new trial by entering an order in substance requiring the defendant to increase, voluntarily, the award made by the jury or submit to a new trial.

IV. The Statutes Involved.

As stated in the opinion of the Circuit Court, at page 45 of the record—

> "the only Federal Statute relating to new trials is Sec. 726 R. S. as amended by Chap. 48, 40 Stat. 1181, 28 U. S. C. A. Sec. 391, which provides that:
>
> "'All United States courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.'"

The Seventh Amendment to the Constitution reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

V. Argument.

The net result of the judge's order was to deny the motion for new trial. The means by which he arrived at the result may or may not be of consequence, but the whole matter is wrapped up in the discretion of the Court. Even if it should be considered that this is a refusal on the part of the Court to set aside the verdict for failure to award substantial

damages, yet it remains an undecided question as to whether this Court will review such an act of the judge.

> "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial Judge abused his discretion we have no occasion to determine."
>
> *Fairmount Glass Works* v. *Cub Fork Coal Co. et al.*, 287 U.S. 474, at 475.

The Circuit Court, in its opinion, at page 47, recognizes the advisability of adapting old forms to modern practice and life, and a reading of this opinion would seem to indicate that the Court finds itself not unwilling, but unable, to take a step which, perhaps, it might otherwise feel inclined to take. We have, in other words, a diversity of opinion among the justices, all, no doubt, feeling like the learned Lord Davey in *Watt* v. *Watt* (at page 53 of the Record), who did not "doubt that the power, if it exists, would be convenient and, in most cases, do substantial justice and save expense."

Without undue discussion of the merits, it would seem that any argument contrary to the procedure adopted by the District Court must necessarily be based on two propositions:

(*a*) that the Court by its order necessarily found that there was such inadequacy in the award of damages by the jury as to render its verdict a practical nullity in the eye of the law; and—

(*b*) that the order of the Court prejudiced the rights of the plaintiff.

The fact that the Court seeks to interfere with the award of damages by the jury is not necessarily a finding by the

Court that the verdict is vitiated by prejudice, fraud or wrongdoing. If that were so, then in every case where remittitur is ordered, it might be said that the Court had found the verdict an improper one and that it had found that the defendant did not have the trial guaranteed by the Constitution.

Remittitur, which has become fixed in the practice of the Court and is the opposite of the act of the judge in the present case, has been recognized as a proceeding sometimes resorted to for the practical reason of forestalling an appeal, as stated in *Denny* v. *Pironi,* 141 U.S. 121, at 126: "Remittiturs are used where the judgment has been accidentally ordered for a larger amount than was due, or occasionally to forestall an appeal." The Court, therefore, recognizes that the presence of an order for remittitur in a particular case may be based on practical considerations of bringing to an end expensive litigation, rather than necessarily meaning that the Court found improper action on the part of the jury. If an order for remittitur does not necessarily mean a finding of impropriety in the verdict, but may be entered "occasionally to forestall an appeal," an order such as the present may not necessarily mean that the Court finds that the plaintiff has failed to have the trial by jury provided by law, but may be entered for the practical reason of ending the litigation.

If remittitur can be used as a practical implement in the administration of justice, so as to "forestall an appeal or end expense," there seems to be no reason why the contrary method may not be adopted, as was done by the District Court, unless the rights of a plaintiff affected by such an order can be said to have been prejudiced.

The rights of the defendant in the District Court were not prejudiced in the true sense of the word.

The prevailing party in the District Court was really the defendant therein. The very act of the plaintiff in bringing

a motion for a new trial was an acknowledgment of the fact that the defendant had prevailed and it can hardly be said that the rights of the plaintiff were prejudiced when the defendant, prevailing party, was the one required to yield in part the advantage which had been gained in the trial. We have already called attention to the fact that the order may not necessarily mean that the plaintiff did not have his day in Court and trial by jury. The trial justice saw the parties and the witnesses, and, however one may speculate with regard to what may have been in his mind, there can be no true reproduction of the sentiments which actuated him in the exercise of his discretion.

Without at this time enlarging upon the foregoing considerations or attempting to discuss the case fully upon its merits, it would seem that sufficient appears in the case and in the two opinions filed below to recommend to this Honorable Court the importance of the question presented for determination.

It would seem that it might be a distinct advantage and a help in procedure before Federal Courts if the judge might have the same power of intelligent control over litigation in cases similar to the present, just as he has the recognized power of ordering remittiturs.

It is respectfully submitted that a writ should issue as prayed for, to the end that this Honorable Court may determine this important question of Federal practice.

Respectfully submitted,

LEO M. HARLOW,
DAVID H. FULTON,
For Petitioner.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statement of the case	2
The question presented	4
The statutes involved	4
Specification of errors to be urged	5
Summary of the argument	5
I. The importance of the proposed practice is sufficient to justify its adoption even though there be no precedent in the Federal Courts	6
II. Federal Courts differ in their approach to disposal of facts from practice in some State Courts	7
III. The petitioner does not concede that the common law, as understood at the time of our Constitution, forbade the suggestion by Court that the verdict be increased	9
IV. This plaintiff cannot be heard to say that he has not had a trial by jury	10
V. The fact that a judge makes an order with reference to the amount of damages is not tantamount to a finding that there has been such passion or prejudice at work in the jury as to destroy the essential character of a jury trial	11
VI. There is no sound difference in logic between remittitur and the practice suggested in the case at bar	15
VII. When all is said and done, the case resolves itself into a question of the discretion of the Court	18

TABLE OF AUTHORITIES CITED.

Cases.

Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69	12

	Page
Barrett v. Virginian Railway Co., 250 U.S. 473	8
Belt v. Lawes, 12 Q.B.D. 356	9, 10
Commissioners of Marion County v. Clark, 94 U.S. 278	8
Denny v. Pironi, 141 U.S. 121	13
Duke v. St. Louis & S.F. R. Co., 172 Fed. 684	13
Fairmount Glass Works v. Cub Fork Coal Co. et al., 287 U.S. 474	7
Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494	11
Gila Valley Ry. Co. v. Hall, 232 U.S. 94	13
Hepner v. United States, 213 U.S. 103	8
Herron v. Southern Pacific Co., 283 U.S. 91	7
Kennon v. Gilmer, 131 U.S. 22	13
Lincoln v. Power, 151 U.S. 436	8
McLanahan et als. v. Universal Insurance Co., 1 Peters, 170	18
Minneapolis, St. Paul &c. Ry. Co. v. Moquin, 283 U.S. 520	12
Patton v. United States, 281 U.S. 276	10
Penn R.R. v. Chamberlain, 288 U.S. 333	8
Peterson, Ex parte, 253 U.S. 300	11
Shanahan v. Boston & Northern St. Ry. Co., 193 Mass. 412	17
Watt case, 1905 A.C. 115	6, 7
STATUTES.	
Constitution, Seventh Amendment	4, 8, 10
Judicial Code, section 240 (a), as amended by the Act of February 13, 1925	1
United States Code, Tit. 28, sec. 347 (a)	1
TEXTBOOKS.	
Annotated Cases, 1914 C, 850	9
Annotated Cases, 1916 B, 384 n.	9
31 Harvard Law Review, 669	11
75 Law. Ed. 1188, and note	11

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 78.

DAVID G. DIMICK,
PETITIONER,
v.
PETER SCHIEDT,
RESPONDENT.

PETITIONER'S BRIEF.

OPINION BELOW.

This case is before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, granted October 8, 1934.

The opinion of the Circuit Court of Appeals is reported in 70 Fed. (2d) 558, and appears in the record, commencing at page 39. The District Court delivered no opinion—its order appears at page 7 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925, now United States Code, Tit. 28, sec. 347 (*a*).

STATEMENT OF THE CASE.

The case of *Peter Schiedt, plaintiff,* v. *David G. Dimick, defendant,* No. 5144 on the Law Docket of the District Court of the United States for the District of Massachusetts, being a claim for injuries alleged to have been sustained while the plaintiff, as a pedestrian, was crossing a public highway in Medford, Massachusetts, was tried before a jury and a verdict returned March 28, 1933, for the plaintiff in the sum of $500.

On March 29, 1933, a motion for a new trial was filed by the plaintiff, setting forth the following reasons (R. 7):

> "1. Because the verdict is against the evidence and the weight of the evidence.
> "2. Because the verdict is a compromise verdict and illegal.
> "3. Because the damages are inadequate."

On this motion the Court entered the following order:

> "April 14, 1933. McLellan, J. On the authority of *Gaffney* v. *Illingsworth,* 90 N. J. L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages."

On the 17th day of April, 1933, the following stipulation, consenting to increase in the amount of damages awarded, was filed:

> "In accordance with the order of court herein made, with regard to new trial, the defendant files this stipu-

lation, hereby consenting to an increase of one thousand dollars ($1,000) in the damages awarded, from the sum of five hundred dollars ($500) awarded by the jury to fifteen hundred dollars ($1,500)."

It will be observed that the motion, if the stipulation be filed, is "to be denied" or otherwise "to be granted." After the stipulation was filed, no further order of denial was made. It may well be that an entry should have been made of "Motion Denied," but none such appears. The petitioner maintains that, strictly speaking, such an order must be read into this record as of some date subsequent to April 17, 1933, and that the respondent's rights, if any, center around such implied order.

The plaintiff in the said action, on April 17, 1933, filed a claim of exception to the order of April 14, 1933.

September 11, 1933, judgment was entered in behalf of Peter Schiedt in the sum of $1540.75 damages and interest, together with costs of suit taxed at $40.75. The plaintiff filed a substitute bill of exceptions, which was filed and allowed August 22, 1933, and duly entered in the United States Circuit Court of Appeals for the First Circuit August 22, 1933. The plaintiff also filed a petition for appeal to the said Circuit Court on the 15th day of November, 1933, and an assignment of errors, setting forth in substance that the Court erred in its order of April 14, 1933.

The case was duly set down for argument in the Circuit Court and was there argued by counsel, and on April 20, 1934, the said Circuit Court ordered that "the judgment of the District Court is reversed with costs and the case is remanded to that Court for further proceedings not inconsistent with this opinion." The said opinion of the Court was a divided opinion. Wilson and Morris, JJ., being the majority, and Morton, J., submitting the dissenting opinion.

The Question Presented.

The broad question here presented, which was discussed by the Circuit Court of Appeals, is whether a judge of the District Court has the power to make an order denying a plaintiff's motion for a new trial, based in substance upon inadequacy of damages, upon a stipulation for increase in the amount of damages having been filed by the defendant in an amount suggested by the Court.

The narrower question may be whether, strictly speaking, the order or memorandum made by the judge is really the order subject to review or whether the respondent is confronted with an order of denial presumed to have been made after the stipulation for additional damages was filed and whether this order rests within the sound discretion of the trial court.

It is surely true that nothing except inadequacy of damages is argued by the respondent. Although his motion (R. 7) alleges three grounds, he has at no time indicated any objection to the verdict on liability.

The Statutes Involved.

As stated in the opinion of the Circuit Court, at the bottom of page 41 of the record—

> "the only Federal Statute relating to new trials is Sec. 726 R. S. as amended by Chap. 48, 40 Stat. 1181, 28 U. S. C. A. Sec. 391, which provides that:
>
> " 'All United States courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.' "

The Seventh Amendment to the Constitution reads as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Specification of Errors to be Urged.

The Circuit Court of Appeals erred—

1. In holding that there was any requirement of the Seventh Amendment to the Federal Constitution preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

2. In holding that there was any requirement at common law preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

3. In holding that the action of the Federal District Judge in this case amounted to a re-examination of the facts.

Summary of the Argument.

I. The importance of the proposed practice.

II. Federal Courts, in their approach to the trial of facts, differ substantially from State Courts.

III. The petitioner does not concede that the common law, as understood at the time of our Constitution, forbade the suggestion of Court that verdicts be increased.

IV. The plaintiff cannot be heard to say that he has not had a trial by jury.

V. The fact that a judge makes an order with reference to the amount of damages is not tantamount to a finding that there has been such passion or prejudice at work in the jury as to destroy the essential character of the jury trial.

VI. There is no sound difference in logic between remittitur and the practice suggested in the case at bar.

VII. When all is said and done, the case resolves itself into a question of the discretion of the Court.

I. The importance of the proposed practice is sufficient to justify its adoption even though there be no precedent in the Federal Courts.

It hardly seems necessary to argue that the adoption of a precedent such as the one under consideration might work to a great saving of time and expense. There can be no doubt that the entire membership of the Circuit Court of Appeals, according to their written expression of opinion, would consider it an advisable procedure; the majority of that Court simply felt that they were unable to adopt it. We assume that the very admission of the question to this Court indicates that the matter is one of public importance. It has been argued in this case, and will doubtless be argued again, that upon a retrial of the tort case herein involved the question might become of no consequence, but it is apparent that there is sufficient of public importance attached to the problem to transcend private interest.

It has likewise been argued that there is no precedent, even at common law, in favor of the action of the judge of the District Court. We are not prepared to admit that this is fully true. We do admit that there is no Federal precedent for it, but, at the same time, the petitioner maintains that there is nothing against it, unless we take the Watt case (1905 A.C.

115) in England, which has been liberally referred to in the opinions below. The Watt case, however, if it be adopted in its entirety, would abolish our entire practice of remittitur, and, as is stated by Morton, J., in his dissenting opinion (R. 49), ". . . is clearly not the law of the Federal Courts."

The question as to whether the Circuit Court of Appeals rightfully undertook to review the action of the trial court comes to this Court, we believe, as a new question. The action of the trial court, so far as the plaintiff is concerned, was essentially a denial of a motion for a new trial based on failure to award substantial damages. The method by which the Court arrived at its conclusion was unimportant if the result was correct and within the discretion of the Court.

> "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine."
>
> *Fairmount Glass Works* v. *Cub Fork Coal Co. et al.*, 287 U.S. 474, at 485.

II. Federal Courts differ in their approach to disposal of facts from practice in some State Courts.

While we fully appreciate the constitutional guarantee of trial by jury and the right of a litigant to have a fair and impartial trial of all facts, it is to be recalled that there are certain particulars in which trial in the Federal Court may differ from that in the State Court.

A Federal judge is not restricted by local statutes or rulings adopted by the other Courts in the State where he may sit. Although due regard is paid to the law of the district, these statutes cannot alter the essential character or functions of the Federal Court.

Herron v. *Southern Pacific Co.*, 283 U.S. 91.

Our Federal Courts can direct a jury on a proper occasion to find a verdict in accordance with the views of the Court, if the Court considers the evidence insufficient in fact to support an opposite verdict, even though there may be some evidence in favor of the party against whom the verdict was directed.

Hepner v. *United States,* 213 U.S. 103.
Barrett v. *Virginian Railway Co.,* 250 U.S. 473.

This practice is justified because "... it is a convenient one, it saves time and expense, it gives scientific certainty to the law in its application to the facts and promotes the ends of justice."

Contrary to State practice, a judge can express himself in favor of one party or the other if he so desires.

Lincoln v. *Power,* 151 U.S. 436, at 442.

The Federal Court is not obliged to send a case to the jury just because there is a scintilla of evidence.

Commissioners of Marion County v. *Clark,* 94 U.S. 278, 284.
Penn R.R. v. *Chamberlain,* 288 U.S. 333, 343.

If the practice in the Federal Court, however sparingly it may be used, permitting a judge to disregard the scintilla of evidence if he sees fit, is not a violation of the Constitution, then it follows necessarily that not every interference with the function of the jury is necessarily an infraction of their rights or a denial of rights to the parties.

It is guaranteed by the Seventh Amendment that "No fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rule of the common law." It might be a pertinent inquiry to ask the meaning of the word "fact." In a tort case liability or no lia-

bility is surely a fact, and so is the existence or non-existence of injury, but when we come to placing an estimate in dollars and cents upon the extent of damage we may all be at a loss to know as to whether there is any such certainty or fixed character about this feature of the case as to dignify a jury's estimate of the monetary value of damages as a "fact." Attention is directed to page 50 of the record, where Morton, J., refers to the freedom of the older judges in dealing with damages found by a jury, and the distinction recognized between questions of liability and the amount of damages.

III. The petitioner does not concede that the common law, as understood at the time of our Constitution, forbade the suggestion by Court that the verdict be increased.

See reference in Ann. Cases, 1916 B, in note beginning at page 384, to old English cases, where verdicts in assault and battery cases amounting to mayhem might be increased by the Court on view of the person and a further discussion of the subject of inadequacy of damages in this note and other volumes of Annotated Cases referred to therein. A note in Annotated Cases, 1914 C, at page 850, maintains that under the old common-law rule a new trial in an action for injuries to the person was not granted on the ground of inadequate damages. The practice was a matter of development.

In *Belt* v. *Lawes,* 12 Q.B.D. 356, the language at page 358 is striking: "The Court does not give damages, but it only says that if the jury had given a sum which was a part of what they had given, the Court would not have been dissatisfied, but more than that, as the power of the Court is discretionary, it seems to me it is competent to the Court to exercise such power in any way which is not unjust." There later occurs the language set out on page 49 of our record, wherein the learned judge intimates that the very practice resorted to in the case at bar may be possible.

Whatever may be said as to later overruling of *Belt* v. *Lawes,* it still remains that as late as this Belt case (1884) there was a belief that the practice of suggesting an increase in verdict was not impossible under the English common law. The case represents the idea of the law as understood up to that time, which would include its interpretation at the time of the adoption of our Constitution and the Seventh Amendment.

IV. This plaintiff cannot be heard to say that he has not had a trial by jury.

Although the Seventh Amendment guarantees trial by jury, we feel that there is a considerable amount of popular misapprehension as to what trial by jury means.

In a criminal case this Honorable Court has defined the constitutional guarantee of trial by jury.

> *Patton* v. *United States,* 281 U.S. 276, at page 288 *et seq.*

The elements are: (1) the twelve-man jury;
(2) the superintendence of the judge, and—
(3) the unanimous verdict.

The plaintiff cannot say that he has not had this guaranteed trial and findings by the jury, that the defendant was liable, and that the plaintiff was injured. Indeed, these facts are not now in any way disputed. The jury verdict stands as to the facts found by them. Their estimate of the financial worth of the damages has been the only subject under discussion.

In like manner this Court has designated the sort of trial by jury guaranteed in civil cases.

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494.
75 Law. Ed. 1188, and note.
Ex parte Peterson, 253 U.S. 300, at 309.

The Constitution is not so hide-bound as to prevent enlightened methods, even though old practices seem to be at variance.

See 31 Harvard Law Review, 669: Trial by jury and the Reform of Civil Procedure, by Professor Austin Wakeman Scott of the Harvard Law School.

No one has been heard to say that the justice of the District Court has not, in the most eminent fashion, guided a jury in its determination of facts, after a trial in which every legal requirement was fulfilled. The single question raised by the disappointed plaintiff is that he did not receive a sufficiently large award.

V. The fact that a judge makes an order with reference to the amount of damages is not tantamount to a finding that there has been such passion or prejudice at work in the jury as to destroy the essential character of a jury trial.

While we must admit that every litigant is entitled to a fair and impartial trial, free from passion or prejudice, yet it does not follow that, because a judge makes an order with reference to damages, he has been deprived of his constitutional right. If this were so, we could have such practice as remittitur. This practice, as believed to be proper at the time of the Constitution, and continued through usage and statute ever since, has approved action by the Court in ordering remission of a part of a plaintiff's verdict at the risk of a new trial. If such an order necessarily meant that there had been passion and prejudice in the minds of the jury or

any other illegal element entering into their verdict, a defendant making a motion for a new trial in the face of such a verdict should have a right to insist upon a complete new trial. The Court justifies its practice of remittitur on the theory that the jury may have been honestly mistaken, and the mere amount of remittitur ordered cannot be argued as proof that the verdict was due to prejudice or wilful disregard of the evidence.

Arkansas Valley Land & Cattle Co. v. *Mann*, 130 U.S. 69.

Minneapolis, St. Paul &c. Ry. Co. v. *Moquin*, 283 U.S. 520.

In the Arkansas Cattle Co. case, at page 76, is this significant language:

> "If the Circuit Court had entered judgment for the whole amount of the verdict below, the defendant could have made no question in this Court as to its being excessive. We could only, in that case, have considered matters of law arising upon the face of the record. And we can do no more when the defendant brings to us a record, showing that the court below has, in the exercise of its discretion, compelled the opposite side, as a condition of its overruling a motion for a new trial, to remit a part of the verdict."

The above language could be paraphrased, and a few of the terms changed, so as to make it fit perfectly the facts of the present case.

> "If it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted, yet the trial court is in a better position to determine

this than the appellate court, so that its determination should ordinarily be accepted."

Gila Valley Ry. Co. v. *Hall,* 232 U.S. 94.

While no Court can enter an absolute judgment for any other sum than that fixed by the jury (*Kennon* v. *Gilmer,* 131 U.S. 22), and while an order for remittitur must be accompanied by the giving of an election to the plaintiff (*Duke* v. *St. Louis & S.F. R. Co.,* 172 Fed. 684, at 687), the latter case recognizes the practical end of the question when, speaking of remittitur, the Court says, "It may, however, be at the suggestion of the court that if not done a new trial will be granted." In the experience of every lawyer, it is not hard to recall instances where such a "suggestion" has been made by the Court, both to a plaintiff, to take a little less than his verdict, and to a defendant, to give a little bit more than the verdict. The practice of putting this suggestion to the plaintiff in writing in the shape of a remittitur order is common; whether the oral suggestions to defendants to give a little more, and thereby escape the risk of a new trial, is as common, we do not pretend to say, as that is a matter for each one's experience. The trial court in this case merely put in writing what many another judge may have orally suggested to the party.

The Court has further recognized the practical end of remittitur when it says, in *Denny* v. *Pironi,* 141 U.S. 121, at 126: "Remittiturs are used where the judgment has been accidentally ordered for a larger amount than was due or, occasionally, to forestall an appeal." If a party can remove a criticism directed at the verdict or judgment, that it is too large, by remitting an amount sufficient to reduce it to a proper point, it necessarily follows that the size of a verdict cannot, in and of itself, unless it be grossly extravagant error, prove that a party has failed to receive his rights of impartial jury trial.

It is true that cases may be quoted from State Courts where verdicts have been rendered for one dollar, or some such ridiculous sum, where it was clear that this was a grossly extravagant error, and these verdicts have been vacated. The cases have been such, however, that the very record would indicate the error. The present is not one of these cases. Ours is a case where the damages awarded were small, but no human mind can guess as to how the jury estimated these damages; whether they disregarded some of the plaintiff's claims for injury, whether they felt he had too long delayed his use of his injured limbs, whether they adopted the testimony of the defendant's doctor who, nine weeks after the accident, thought the plaintiff could return to work in a month or six weeks (R. 34). They might have felt that the man was entitled to only thirteen weeks' disability. They saw the plaintiff and the witnesses, including the doctors. They may not have been satisfied as to the plaintiff's earning capacity, even before the accident or as to the fair character of the expenses beyond the bills of $60 from the hospital (R. 11, 12). There are a multitude of conclusions which they may have reached, all, so far as we are concerned, highly speculative. The estimate that they placed upon the plaintiff's pain and suffering was all a matter for their own opinion and consciences.

The trial judge, by his order, did nothing more than to indicate that he personally felt that the jury were mistaken as to their estimate of the amount which should be awarded as damages. He gave the defendant a chance to contribute some more money, so as to raise the verdict to a point which he thought would be large enough so that the Court would feel right about denying the motion for a new trial. The reasoning by which he arrived at this result or the citations which he used in the order are of no consequence, if the result reached was a proper one.

We repeat what we have earlier said, we question whether the order of the trial court was more than a memorandum

for an order, and it may well be that the only order which can be properly read into this record is an order denying the motion for new trial. We are prepared to admit that the judge's citations in his order are not on all fours with the present case, but repeat that the method by which he arrived at the result is of no consequence if the result was within his discretion. We likewise argue that if a jury verdict can be amended by a trial court, even in a contract case, it follows that a sweeping statement that there can be no interference with the jury's verdict goes to a greater extreme than any constitutional right of a party.

VI. There is no sound difference in logic between remittitur and the practice suggested in the case at bar.

The justification for remittitur on the ordinary motion for new trial rests on the propositions:

(*a*) as to the defendant moving party, that he can hardly be heard to complain since he is getting something at the hands of the Court which he has asked the Court as a matter of discretion to give him;
(*b*) as to the plaintiff, that he has assented to it.

There may be other fine-spun arguments that awarding a part of the jury's verdict is not a violation of their rights, etc., but, after all, the jury are not concerned with the result if the parties are satisfied.

In remittitur the plaintiff is the prevailing party. By a sort of compulsion or suggestion, whatever you choose to call it, he is urged to remit a part of the verdict or go to the hazard and expense of a new trial: he remits, and the new trial is denied. The act of the Court, by whatever preliminaries it is preceded, is essentially a denial of the motion, and is founded in the discretion of the Court.

The motion is made by the losing party. The decision of the Court falls short of finding such passion, prejudice, or illegality as to vitiate the entire verdict, but feeling that there has been unintentional error or well-intentioned excessive award assists the losing party by its suggestion of remittitur, although it does not grant his prayer in its entirety.

We have spoken above with regard to the "prevailing party." The Court usually has occasion to construe this phrase in connection with awarding of costs, and we do not know that the meaning of the phrase has ever been discussed outside of such cases. It would seem, however, that, in the common acceptance of the term, the plaintiff, having received a verdict in an amount which he claims to be thoroughly inadequate, can hardly be said to be the prevailing party even from his own point of view, and the fact that he has filed a motion for a new trial is his own acknowledgment and claim that he has failed to get that which he sought. In the everyday use of language, therefore, it would seem as if the "prevailing party" at the time of this trial was considered to be the defendant. We believe that when the Court speaks about the "prevailing party," and whether or not he is aggrieved in connection with decisions, on motions for new trials, the Court would be more disposed to use the terms in their everyday use as being equivalent to the party who got the best of the argument, than to restrict the words to cover only the party who received a verdict, however small or large.

In the case at bar the dissatisfied party, who in this case is the plaintiff, moves for new trial on the ground of inadequate damages. There is no finding, necessarily inferred from the memorandum of the Court, to substantiate any claim that the trial is tainted with any illegal element. The Court has denied the plaintiff's motion, but, as a condition precedent to it, has suggested an increase in damages. The plaintiff could have no exception to a complete denial of the motion;

he has addressed his appeal expressly to the discretion of the Court; it does not lie in his mouth to complain as to the manner of the exercise of that discretion. The defendant, who was really the prevailing party at the trial, judging from the motion filed, cannot be heard to complain because he has consented to the increase.

It is beside the point to cite the case of *Shanahan* v. *Boston & Northern St. Ry. Co.*, 193 Mass. 412. In that case there had been a verdict for the defendant. The plaintiff moved for new trial. The Court apparently first determined a new trial should be granted, and thereby implied a finding that there had been no legal trial at all, and then attempted to turn an out-and-out verdict for the defendant into a small plaintiff's verdict, which the plaintiff refused to accept. Clearly, the Court attempted to re-examine the fact of liability, rather than merely to superintend the jury's estimate of damages, and the ultimate result was not based on any fact found by the jury, but was in direct conflict with their finding that there was no liability. Not a particle of the ultimate result could be said to be the jury's verdict, and, if it was to stand at all, it must stand as an agreement of counsel, which counsel refused to make.

Neither are State citations of great value in connection with this problem. As has been pointed out, the power of Federal Courts with regard to trial of facts is different from that of the State Courts. Some State Constitutions vary in their jury trial guarantee from the language of the Federal Constitution, and, in some of the States, there are statutes with regard to the handling of motions for new trial. Our problem is entirely under the Federal Constitution and concerns the Federal Courts. There is sufficient discussion of the powers of the Court in the decisions of this Court and the Federal Courts to solve the problem with the assistance of the logic of the Constitution and the history of jury trial at common law, without reference to the action of the State Courts.

VII. When all is said and done, the case resolves itself into a question of the discretion of the Court.

A motion for a new trial has never been considered a matter of right; it is directed to the discretion of the Court.

McLanahan et als. v. *Universal Insurance Co.*, 1 Peters, 170.

By whatever steps a Court may arrive at a point where its discretion is finally exercised, we still have the discretionary order denying a motion which is not a matter of right.

It is not quite exact to say that the memorandum of the Court in this case has stated the reason for his actions, even though it refers to certain cases as "authority." The reasons of the Court for his action may be eminently practical ones, having to do with the final disposition of the case, and probably are not expressed in the order. The fact that he refers to certain cases as giving him "authority" means nothing if he had the power from any source, including his discretion, to deny this motion after the defendant had accepted the friendly suggestion of the Court that the verdict be increased. It is highly significant that the alternative offered or threatened is not an assessment of damages, but a full trial, giving the defendant an opportunity to defend every issue of the case.

It is therefore respectfully argued that the decision of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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Attorneys for Petitioner.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

upreme Court of the United States.

October Term, 1933.

No. 78

DAVID G. DIMICK,
Petitioner,

v.

PETER SCHIEDT,
Respondent.

rief in Opposition to Petition for Writ of Certiorari.

JOHN G. PALFREY,
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INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statement of the case	2
Summary of argument	3
Argument	4
I. The alleged importance of the question in federal practice is not substantiated by any proof in the petitioner's brief	4
II. Review of the present judgment is not shown to be of great importance even to the petitioner, for his rights are not concluded thereby	7
A. The judgment was not final	7
B. The question probably will be moot	7
C. The possible saving to the petitioner is outweighed by other considerations	8
III. The petitioner's brief fails to disclose any probable error in the judgment of the Circuit Court of Appeals	9
A. Neither common law precedent nor statutory authority for the order of the District Court has been cited and none can be found	9
B. The decision that the District Court order violated the respondent's rights under the Seventh Amendment has not only not been shown to be wrong but is plainly right	10
(a) Remittitur cases are not a sound analogy	10
(b) The decision is right on principle	11
(c) The decision is supported by the existing authorities	12
Conclusion	15

TABLE OF AUTHORITIES CITED.

Adamson v. County of Los Angeles, 52 Cal. App. 125	13
American Const. Co. v. Jacksonville Ry., 148 U.S. 372	8
Arkansas Valley Co. v. Mann, 130 U.S. 69	11

	Page
Blunt v. Little, 3 Mason, 102	10
Carpentier v. Gardiner, 29 Cal. 160 (1865)	13
Carr v. Miner, 42 Ill. 179	9
Chicago & Northwestern Ry. v. Osborne, 146 U.S. 354	8
Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474	12
Gaffney v. Illingsworth, 90 N.J.L. 490	9
Goldsmith v. Detroit, Jackson & Chicago Ry., 165 Mich. 177	14
Guth v. Fisher, 251 N.W. 223 (Wis. 1933)	7
Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U.S. 251	8
Holmes v. Misroon, 1 Tread. (S.C.) 21	10
Kennon v. Gilmer, 131 U.S. 22	11
Lambert v. Craig, 12 Pick. 198	10
Lionel Barber & Co. v. Deutsche Bank, 1919 A.C. 304	10
Lorf v. City of Detroit, 145 Mich. 265	14
Minneapolis, St. Paul &c. Ry. Co. v. Moquin, 283 U.S. 520	11, 12
Minot v. Boston, 201 Mass. 10	13
Phillips v. Granger, 134 Mass. 475	13
Pickwood v. Wright, 1 H. Bl. 642 (1791)	10
Risch v. Lawhead, 211 Wis. 270 (1933)	7, 14
Shanahan v. Boston & Northern St. Ry., 193 Mass. 412	13
Slaker v. O'Connor, 278 U.S. 188	8
Spiller v. Atchison, T. & S.F. Ry. Co., 253 U.S. 117	8
Stanton v. Foley, 168 Mich. 453	14
Watt v. Watt, 1905 A.C. 115	10
Werner v. Bryden, 84 Cal. App. 472	13
Judicial Code (amended by Act of Feb. 13, 1925), sec. 240 (a), now 28 U.S.C. sec. 347 (a)	1
Massachusetts General Laws (Ter. Ed.), c. 231, sec. 127	13
Seventh Amendment to the Constitution	4, 9, 10, 11
28 U.S.C. sec. 346	5

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 1103.

DAVID G. DIMICK,
PETITIONER,
v.
PETER SCHIEDT,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 70 Federal (2d) 558, and appears in the record, commencing at page 43. No opinion was delivered by the District Court, but the order made by that court on the plaintiff's motion for new trial, from which the appeal was prosecuted, appears in the record at page 8.

JURISDICTION.

The jurisdiction of the Court to grant the writ under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now 28 U.S.C. sec. 347 (a), is not denied. The judgment of the Circuit Court of Appeals was rendered April 20, 1934, and the petition for certiorari was filed on or about May 31, 1934, within three months from the entry of such judgment.

STATEMENT OF THE CASE AND QUESTION INVOLVED.

The petitioner, defendant in the courts below, asks this Court to review the judgment of the Circuit Court of Appeals for the First Circuit which reversed a judgment of the District Court for the District of Massachusetts in favor of the respondent, the plaintiff below, and remanded the case to the District Court for further proceedings.

The plaintiff-respondent, a citizen of Massachusetts, brought this action against the petitioner, a citizen of Maine, alleging substantial personal injuries caused by the petitioner's negligent operation of an automobile on a public way in Massachusetts. The case was tried before a jury, who returned a verdict in favor of respondent in the sum of $500 (R. 7). The evidence (which forms part of the Record, pp. 10-39) tended to show that the plaintiff, if entitled to recover at all, was entitled to more than $500 for the suffering, loss of wages, and medical expenses incurred (R. 49). Accordingly, the plaintiff-respondent moved for a new trial, urging, among other grounds, that the verdict was against the weight of the evidence, that it was a compromise verdict and illegal, and that the damages were inadequate (R. 7, 8). The trial court made the following order in disposing of the motion for new trial (R. 8):

> "On the authority of *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500., as found by the jury, to $1,500. on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages."

The petitioner filed the stipulation, and judgment was entered for the respondent in the sum of $1500, plus interest

and costs (R. 9). The respondent perfected his exception to the order and duly prosecuted an appeal from the judgment to the Circuit Court of Appeals (R. 9, 40). That court, after hearing, rendered its judgment reversing the judgment of the District Court and remanding the case to the District Court for further proceedings not inconsistent with the opinion (R. 50). The judgment was by a majority of the court, Morton, Circuit Judge, dissenting.

Summary of Argument.

I. The only ground stated in the petition for granting certiorari is the alleged importance of the question in federal practice, but this is not substantiated by any proof of importance either to the courts, the parties, or the public. The petitioner has not cited, here or in the court below, any decision of any court—federal, state or English—in which this "important" question has arisen. The lack of authority to sustain the order of the trial court suggests doubt whether there is any real question involved. The order tends to raise new legal problems rather than end litigation.

II. The judgment of the Circuit Court of Appeals was not a final determination of the substantive rights of the parties. Certiorari will not usually be granted prior to final judgment unless extraordinary circumstances so require. The question will in all probability be moot after a new trial, but the petitioner's right to seek review is not lost. The possibility of saving the expense of a new trial is entirely outweighed by the needless consumption of the time of this Court and the burdens of expense and delay imposed on the respondent by successive petitions for review.

III. Though containing a summary discussion of the merits, the petitioner's brief fails to show any probable

error in the decision below. No precedent for the order has been discovered by counsel, or by the judges of the Circuit Court of Appeals, or by the state courts where the question has arisen. This fact affords sufficient basis for the decision without consideration of the limitations imposed by the Seventh Amendment. And when these are considered, the decision is clearly correct, for the trial court has usurped the function of the jury in determining plaintiff's damages and has re-examined facts otherwise than according to the rules of the common law. Remittitur cases do not furnish a complete analogy for upholding the order, since remittiturs were not unknown when the Constitution was adopted. It is pure fiction to assume the jury intended to give the least amount recoverable, and the plaintiff is deprived of his right of trial by jury in being deprived of at least an election to take the amount so determined by the court or a new trial. The judgment of the Circuit Court of Appeals is both plainly right on principle and supported by the existing authorities.

Argument.

I. The alleged importance of the question in federal practice is not substantiated by any proof in the petitioner's brief.

The sole reason relied on by the petitioner in applying for a writ of certiorari is the presence of a question of practice in the federal courts of great importance to the bench and to the bar (Petition, p. 4). Beyond the bald assertion in the petition, however, it is nowhere made to appear that the question is of the importance ascribed to it therein.

First, of the importance of the question to the federal judges. The case is one where the plaintiff in a personal injury suit, having recovered a verdict establishing the liability of the defendant, is dissatisfied with the amount of

the damages and is asking for a new trial. The number of such cases on the docket of any district court, as compared to the entire number of cases pending before it, must be very small. The number of such cases in which the court concludes that the damages awarded are inadequate is decidedly much smaller. And the number of cases of the kind last described, in which a conscientious court would be willing to substitute its opinion as to the amount the plaintiff should recover instead of referring the question to a new jury, could scarcely warrant a serious contention that the business of the federal courts is hampered by lack of power of the court to make such an order, or that it would be materially expedited if that power were established. Therefore, as far as frequency of recurrence of the question is concerned, it can scarcely be regarded as of great importance to the bench or to the public either.

The petitioner's brief (p. 8) ventures a suggestion that the Circuit Court of Appeals found itself "not unwilling but unable to take a step which, perhaps, it might otherwise feel inclined to take." The inference intended is that the judges think they ought to have the power even if they did not have much occasion to use it, and that it is important for them to know if they do have it.

If the court below had deemed the question such an important one that it should be decided by this Court, that court could have adopted the way to assure a decision, namely, by certifying the question. 28 U.S.C. sec. 346. On the contrary, the inference of importance which the petitioner attempts to suggest is amply refuted by the conclusion of the majority opinion of the court:

> "As the granting of a new trial fully preserves the rights of both parties, it leads us to conclude that there is no necessity, or sound basis, for such a departure from the rules of the common law" (R. 50; 70 F. (2d) 562).

Secondly, the question is said to be important to the bar. But the petitioner has not cited, either here or in the court below, one decision of any court—federal, state, or English—in which the power of the trial judge to increase the verdict in a personal injury suit has been mentioned. It is to be expected that a question of importance to the bar would be the subject of at least some moot discussion if not of diverse opinions. The motion for a new trial because of excessiveness or inadequacy of the damages is certainly not new. For many years the common-law judges have dealt with such motions, without arrogating to themselves the power now claimed for them, and apparently this question of great importance has rarely arisen. Doubt may be properly expressed whether the bar even supposes that the matter could be open to question.

The petitioner urges further that the action of the District Court tends to "end litigation and lessen the expense." If it be assumed that the bar is interested in the former and if the contention is to be considered as a whole, the contention proves too much. No doubt it would be convenient at times if the court could compel the parties to settle their differences or at least compel them to forego trial by jury. Such power would tend to end litigation and surely lessen the expense.

The dissenting judge of the Circuit Court of Appeals (R. 52; 70 F. (2d) 563) felt that a trial judge ought to be able to state the minimum figure recoverable by the plaintiff, when the jury's verdict is inadequate, and give the defendant the election of paying it or submitting to a new trial. If the minimum amount of damages is a figure about which reasonable men might differ, then even this fact is peculiarly appropriate for a jury. If, on the other hand, it is such a sum that no reasonable men could differ as to the figure, then it is submitted the amount raises a question of law on which either party should be entitled to a review.

In Wisconsin, where, under local decisions, the court may increase verdicts, the Supreme Court passes on the question whether the amount is the least amount a jury could find, and almost every automobile case raises the legal question. Cf. *Risch* v. *Lawhead,* 211 Wis. 270, 278 (1933). *Guth* v. *Fisher,* 251 N.W. 223 (Wis. 1933). That the injection into the case of a new question of law subject to review by appellate courts would neither foster the end of litigation nor lessen the expense is obvious, and this argument must fail.

It is submitted, therefore, that petitioner has not in any way shown that the question raised by the case at bar is of such great importance to the courts, the bar, or the public in general as to justify the consideration of this Court.

II. Review of the present judgment is not shown to be of great importance even to the petitioner, for his rights are not concluded thereby.

The Circuit Court of Appeals, concluding that "a new trial fully preserves the rights of both parties," has remanded the case to the District Court for further proceedings (R. 50).

This judgment in no way affects any substantive rights of the parties. It is expressly provided in the order of the trial court that the new trial, if any, shall be "both on the question of liability and damages" (R. 8). Nothing in the judgment precludes the petitioner from showing on the new trial, and in the same manner as at the first trial, that he should not be liable for any greater sum than the amount of the judgment originally rendered, or from attempting again to show that he should not be liable at all. It is extremely unlikely that the present question would arise after a second trial.

Where the decision of the court of appeals has not determined the rights of the parties, but contemplates further

proceedings, the common practice of this Court has been, except in extraordinary cases, to deny certiorari, even though reversal would conclude the litigation.

Chicago & Northwestern Ry. v. *Osborne*, 146 U.S. 354.

Cf. American Const. Co. v. *Jacksonville Ry.*, 148 U.S. 372, 384.

Spiller v. *Atchison, T. & S.F. Ry. Co.*, 253 U.S. 117, 121.

And at such stage of the litigation an appeal has been held frivolous.

Slaker v. *O'Connor*, 278 U.S. 188.

It is obvious that no "extraordinary inconvenience and embarrassment" to the petitioner has been shown, or even suggested, to justify consideration of the case by this Court at the present stage of the proceedings. Of course, the denial of the writ is not equivalent to affirmance of the judgment, and, after a final determination of the rights of the parties, the petitioner would doubtless have an opportunity to seek a review by this Court, if the question were still deemed of importance to him.

Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U.S. 251, 258.

The only possible argument which petitioner can advance in favor of granting the writ at this time is that, by a reversal of the judgment of the Circuit Court of Appeals, petitioner might save the expense of a new trial. Affirmance means a new trial anyway. The consideration of the needless consumption of the time of this Court in deciding a question which may, and probably will, become entirely moot, and the expense and delay imposed on the respondent

through possible successive petitions for certiorari to this Court, it is submitted, more than abundantly outweighs this contention.

Since it has often been held that the importance of the question to the parties, as distinct from the general public, is not a sufficient argument for the allowance of the writ, it must follow that the writ will be denied where the question is not of vital importance even to the parties themselves.

III. The petitioner's brief fails to disclose any probable error in the judgment of the Circuit Court of Appeals.

The Circuit Court of Appeals put its decision on two grounds: that the action of the trial judge was not warranted by any precedent in the common law or by statute, and that, being unknown to the common law, it was a practice precluded by constitutional limitations embodied in the Seventh Amendment.

The first ground is not refuted by the petitioner, and alone is sufficient to sustain the judgment. Unless there is common law or statutory sanction, the power of a federal court, or any court, to increase a verdict without the consent of the parties cannot exist.

No statute, federal or state, has been cited as tending to sustain the trial court's action. The researches of counsel for both parties have failed to show any precedent for it. The independent extensive search made by the circuit judges (R. 46; 70 F. (2d) 560) discovered no case to support it. *Carr* v. *Miner,* 42 Ill. 179, and *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, relied upon by the district judge, are distinguishable, as indicated in the opinion of the Circuit Court of Appeals, and are properly not urged as authorities by the petitioner.

The result is that petitioner has failed to point out any basis, plausible or otherwise, for his second specification of

error (Petition, p. 4). The argument made by the lack of precedent for such a relatively simple matter relating to new trials is unanswered and, as respondent contends, unanswerable. As it justifies the conclusion reached by the Circuit Court of Appeals, there should be no necessity of considering the argument based on constitutional limitations.

But the decision is rightly placed on this ground also. The Seventh Amendment guarantees to the plaintiff-respondent a right of trial by jury as it existed at common law when the Constitution was adopted, and further provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Both parts of the amendment are violated by the order of the District Court.

The petitioner's only reply to this argument is the analogy of remittitur cases, and this analogy also seemed persuasive to the dissenting judge (R. 52; 70 F. (2d) 561). But the premise of the argument is that raising the verdict of the jury to an amount satisfactory to the court without consent of the plaintiff was unknown to the common law.

On the other hand, remittiturs, although eventually condemned in England—

> *Watt* v. *Watt,* 1905 A.C. 115;
> *Lionel Barber & Co.* v. *Deutsche Bank,* 1919 A.C. 304, 314—

were not unknown to the common law at or about the time of the adoption of the Constitution, and were in use in the early federal and state courts.

> *Pickwood* v. *Wright,* 1 H. Bl. 642 (1791).
> *Blunt* v. *Little,* 3 Mason, 102.
> *Lambert* v. *Craig,* 12 Pick. 198, 201.
> *Holmes* v. *Misroon,* 1 Tread. (S.C.) 21, 34.

Of course, being known to the common law, remittiturs are not within the prohibition of the Seventh Amendment.

Arkansas Valley Co. v. *Mann,* 130 U.S. 69, 72.

Thus, the supposed analogy of remittitur cases as authority for the order of the District Court fails in the very premise on which the constitutional validity of the former depends.

On principle, moreover, the judgment of the Circuit Court of Appeals is right in this respect. This Court, at the very same term at which it decided *Arkansas Valley Co.* v. *Mann, supra,* held that "in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by a jury."

Kennon v. *Gilmer,* 131 U.S. 22, 29.

The Court further held that *both* parties were prejudiced by such an order of the trial court.

Thus, though the court may tamper with the plaintiff's excessive verdict in a remittitur case, it may not compel him to take the reduced amount, but always must allow the alternative of a new trial. To give the wrongdoer the election of paying the minimum damages or taking a new trial may fully protect his rights but, when the plaintiff's rights are considered, it is difficult to distinguish such an order from the compulsory remittitur forbidden by *Kennon* v. *Gilmer, supra.*

Moreover, in remittitur cases, the court assumes in favor of the verdict that the jury merely erred in applying the rule of damages, for otherwise the verdict could not stand at all.

Minneapolis, St. Paul &c. Ry. Co. v. *Moquin,* 283 U.S. 520.

The amount by which the verdict exceeds the largest amount recoverable is obvious error, but the jury have awarded in favor of the plaintiff, and against the defendant, the entire amount for which the judgment is entered. But when the jury has awarded less than they should, while the difference between the verdict and the minimum recovery is also obvious error, the increased sum cannot in any sense be regarded as the amount awarded by the jury in favor of the plaintiff or against the defendant. To say the jury *intended* to award the least amount in their power is a fictitious explanation as to the probable cause of their error and a speculation as to the extent of the same. The plaintiff's right of trial by jury cannot thus be circumscribed by judicial speculation as to the extent of the wrong done him.

Minneapolis, St. Paul &c. Ry. Co. v. *Moquin, supra.*

The decision of the Circuit Court of Appeals is not only sound on principle, but it has also the support of the few authorities which may be found.

In its most recent pertinent decision this Court reversed a judgment of a Circuit Court of Appeals which had ordered an increase in the verdict to the minimum amount which that court thought the plaintiff could recover.

Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U.S. 474.

While different considerations applied to this decision, and the case at bar is distinguishable, the result tends to support the view that no federal court may substitute its view of the damages for the amount found by the jury.

See 287 U.S. at p. 480.

In the Massachusetts state courts remittiturs are expressly authorized by statute, General Laws (Ter. Ed.), chapter 231, section 127, but the court said:

> "but the statute does not confer the right even with the assent of the defendant to impose upon a plaintiff a voluntary acceptance of an assessment to be ascertained by the judge where the verdict of the jury has been adverse. . . . This course cannot be taken without the concurrence of both parties."

Shanahan v. *Boston & Northern St. Ry.*, 193 Mass. 412, 414.
Phillips v. *Granger*, 134 Mass. 475.

The court may not even add interest to the verdict.

Minot v. *Boston*, 201 Mass. 10, 12.

In California remittiturs were early recognized by judicial decision (see *Carpentier* v. *Gardiner*, 29 Cal. 160, 165 (1865), but the power of the trial court to compel the plaintiff to accept damages assessed by the court was vigorously denied in *Werner* v. *Bryden*, 84 Cal. App. 472, where the court said:

> "But no case has been discovered in which an order such as that in question here has been upheld. . . . The question is not whether the amount fixed by the court is a reasonable sum to be allowed as damages, but the plaintiff has the constitutional right to have such damages assessed by the jury."

Adamson v. *County of Los Angeles*, 52 Cal. App. 125, which is cited in the dissenting opinion (R. 54; 70 F. (2d) 564), was an attack by a third person where both litigants had consented to an increase in the verdict, and hence is not an authority contra.

The Michigan courts have frequently ordered remittiturs, but refuse to permit an increase in the verdict. Of such an order, it was said: "We have been unable to find any case sustaining this holding and we think it was unauthorized and erroneous."

Lorf v. *City of Detroit,* 145 Mich. 265, 267.

And in a later case—

> "We cannot, however, agree with him as to his right to annex such a condition. It was equivalent to the trial court himself assessing the damages. This is the province of the jury."
>
> *Goldsmith* v. *Detroit, Jackson & Chicago Ry.,* 165 Mich. 177, 179.

See also *Stanton* v. *Foley,* 168 Mich. 453, 456.

Wisconsin has a very liberal practice regarding remittiturs. Yet in a very recent case involving an increase in the verdict to the least amount the jury could award, the Supreme Court concluded that—

> "Since the court finds the 'least amount', plaintiff must be given an option to consent to the amount of damages found by the court."
>
> *Risch* v. *Lawhead,* 211 Wis. 270, 278 (1933), *supra.*

All these authorities recognize the constitutionality of remittiturs, and yet regard them as no support for the validity of an order such as that in question. The result is that petitioner has failed to cite any authority tending to show that there was a likelihood of error in the second ground upon which the decision rests. Sound principles, as well as the foregoing citations, clearly support the deci-

sion, and in the absence of any contrary authority show that no occasion exists for granting the review sought by the petitioner.

Conclusion.

The petitioner's brief fails to show that the question to be reviewed is important to the courts, the public, or even to the parties themselves. It fails to show that there is any diversity of opinion among the authorities or any ground upon which this Court might reach a different conclusion from the decision below.

On the contrary, it appears that the question is likely to become moot and that the rights of the parties are fully protected by granting the new trial. It has also been shown that the decision not only was plainly right on principle, but has the support of the few authorities existing, and that researches of the circuit court judges, of counsel, and of the judges in several of the highest state courts have failed to discover any precedent for the action of the District Court.

Accordingly, we respectfully urge that the petition be denied.

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Supreme Court of the United States.

October Term, 1934.

No. 78.

David G. Dimick,
Petitioner,

v.

Peter Schiedt,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

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INDEX OF SUBJECT MATTER.

	Page
Opinions below	1
Statement of facts	1
Constitutional provision and statutes involved	3
Question involved	3
Summary of the argument	4
Argument	5
I. The action of the trial court in disposing of the motion for a new trial was subject to review by the Circuit Court of Appeals	5
The trial court was clearly making a ruling of law	5
The finding of inadequacy of damages called for the proper disposition of the case	7
The order was claimed to violate constitutional rights	9
II. No precedent has been cited for the order of the District Court and none can be found	10
The cases cited by the trial court do not support the order	11
No other authority has been found	12
(*a*) English cases	12
(*b*) Federal cases	16
(*c*) State cases	19
III. The federal statute governing new trials does not authorize the order of the District Court	25
The federal statute adopts the general practice of courts of law in respect to new trials	26
The general practice of courts not only does not include such orders but is opposed to them	26
IV. The order violates rights secured to the respondent by the Seventh Amendment	27
The order of the trial judge was a usurpation of the function of the jury	28

Page

The order was also a re-examination of facts tried by a jury otherwise than according to the rules of the common law 32

The order in any event exceeded the powers of a federal trial judge 35

The order cannot be justified by the analogy of remittiturs 36

Conclusion 43

TABLE OF AUTHORITIES CITED.

Cases.

Adamson v. County of Los Angeles, 52 Cal. App. 125 19*n*.

Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 9, 40, 41

Austin v. Hilliers, Hardres, 408 13, 14

Baker v. Brown, 2 M. & W. 199 15

Baylis v. Travellers' Ins. Co., 113 U.S. 316 28, 36

Belt v. Lawes, 12 Q.B.D. 356 15

Bernard v. No. Yakima, 80 Wash. 472 19*n*

Blunt v. Little, 3 Mason, 102 41

Brown v. Seymour, 1 Wils. 5 13, 14

Burton v. Baynes, 1 Barnes, 153 13

Campbell v. Sutliff, 193 Wis. 370 19*n*.

Capital Traction Company v. Hof, 174 U.S. 1 34, 36, 39

Carpentier v. Gardner, 29 Cal. 160 40

Carr v. Miner, 42 Ill. 179 11

Clausing v. Kershaw, 129 Wash. 67 19*n*

Cook v. Beal, 1 L. Raym. 176 13, 14

Cuming v. Sibley, 4 Burr. 2489 34

Davis v. Foliot, Style, 310 13

Dwyer v. United States, 170 Fed. 160 6

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 5, 7, 14

Page
Felton v. Spiro, 78 Fed. 576 6, 9
Ford v. Minn. St. Ry. Co., 98 Minn. 96 19*n*.
Gaffney v. Illingsworth, 90 N.J.L. 490 11, 19*n*.
Gasoline Products Co. v. Champlin Co., 283 U.S. 494 28
Glenwood Irrigation Co. v. Vallery, 248 Fed. 483 8, 17, 31
Goldsmith v. Detroit, Jackson & Chicago Ry., 165 Mich. 177 23, 40
Gosczinski v. Carlson, 157 Wis. 551 19*n*.
Hillman v. City of Seattle, 163 Wash. 401 19*n*.
Hodges v. Easton, 106 U.S. 408 28
Hooper v. Pope, Latch, 223 13
Indianapolis & St. Louis R.R. Co. v. Horst, 93 U.S. 291 25
Jackson v. Williamson, 2 T.R. 281 14
James v. Morey, 44 Ill. 352 12
Jervis v. Lucas, Style, 345 13, 14
Kennon v. Gilmer, 131 U.S. 22 32, 33, 35
Lionel Barber & Co. v. Deutsche Bank, [1919] A.C. 304 13
Lorf v. City of Detroit, 145 Mich. 265 23, 40
McCoy v. Lemon, 11 Rich. 165 14, 24
Miller v. Maryland Casualty Co., 40 F. (2d) 463 34
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520 7, 38
Minot v. Boston, 201 Mass. 10 22
Morgan's Executor v. Gay, 19 Wall. 81 36
Ohio Valley Bank v. Greenbaum Sons Co., 11 F. (2d) 87 31
Original Sixteen to One Mine, Inc., v. Twenty-One Mining Co., 254 Fed. 630 18
Paine v. St. Paul Union Stockyards Co., 35 Fed. (2d) 624 6
Parsons v. Bedford, 3 Pet. 433 33
Phillips v. Granger, 134 Mass. 475 22, 40

Page

Phillips v. South Western Ry. Co., 4 Q.B.D. 406 15
Phillips v. South Western Ry. Co., 5 Q.B.D. 78 15
Pederson v. Delaware, L. & W. R. Co., 229 U.S. 146 31
Peterson, Ex parte, 253 U.S. 300 28
Pickwood v. Wright, 1 H. Bl. 642 41
Pugh v. Bluff City Excursion Co., 177 Fed. 399 8
Richards v. Sandford, 2 E.D. Smith 349, semble 19*n*.
Risch v. Lawhead, 211 Wis. 270 19*n*, 40
Reuter v. Hickman, Lauson & Diener Co., 160 Wis. 284 19*n*.
Schuerholz v. Roach, 58 F. (2d) 32 7
Shanahan v. Boston & Northern St. Ry. Co., 193 Mass. 412 20, 21, 22, 39, 40
Slocum v. New York Life Ins. Co., 228 U.S. 364 29, 30
Smallpiece v. Buckingham, Buller's N.P. 21a 13
Stanton v. Foley, 168 Mich. 453 24
Stetson v. Stindt, 279 Fed. 209 8, 16, 31
Tripcony's Case, Dyer, 105a 13
United Press Ass'ns v. National Newspapers Ass'n, 254 Fed. 284 8
United States v. 1363 Bags of Merchandise, 2 Sprague, 84 36
United States v. Train et al., 12 Fed. 852 25
United States v. Wonson, 1 Gall. 5 33
Walker v. Southern Pacific Railroad, 165 U.S. 593 29
Watt v. Watt, [1905] A.C. 115 12, 15, 16, 21, 35, 41
Werner v. Bryden, 84 Cal. 472; 258 P. 138 22, 40

STATUTES.

Constitution of the United States, Seventh Amendment 3, 27, 29, 32
Judicial Code, sec. 269, as amended 3, 25
U.S.C., Title 28, sec. 391 3, 25, 26
U.S.C. Title 28, section 770 3, 36

Page

TEXTBOOKS.

Annotated Cases 1916 B, 384 13
Buller's Nisi Prius (7th ed.), p. 21a 13, 42
Mayne on Damages (10th ed. 1927), 579 14
Reeve's History of the Common Law 21

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 78.

DAVID G. DIMICK, PETITIONER,

v.

PETER SCHIEDT, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinions of the Circuit Court of Appeals are reported in 70 Federal (2d) 558, and appear in the record, commencing at page 39. No opinion was delivered by the District Court, but the order made by that court on the plaintiff's motion for new trial, from which the appeal was prosecuted, appears in the record at page 7.

STATEMENT OF FACTS.

The plaintiff-respondent, a citizen of Massachusetts, brought this action against the petitioner, a citizen of Maine, alleging substantial personal injuries caused by the peti-

tioner's negligent operation of an automobile on a public way in Massachusetts. The case was tried before a jury, who returned a verdict in favor of respondent in the sum of $500 (R. 7). The evidence (which forms part of the record, pp. 9-37) tended to show that the plaintiff, if entitled to recover at all, was entitled to more than $500 for the suffering, loss of wages, and medical expenses incurred (R. 45). Accordingly, the plaintiff-respondent moved for a new trial, urging that the verdict was against the weight of the evidence, that it was a compromise verdict and illegal, and that the damages were inadequate (R. 7). The trial court made the following order in disposing of the motion for new trial (R. 7):

> "On the authority of *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500., as found by the jury, to $1,500. on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages."

The petitioner filed the stipulation, and judgment was entered for the respondent in the sum of $1500, plus interest and costs (R. 9). The respondent perfected his exception to the order and duly prosecuted an appeal from the judgment to the Circuit Court of Appeals for the First Circuit (R. 8, 38, 39). That court, after hearing, rendered its judgment reversing the judgment of the District Court and remanding the case to the District Court for further proceedings not inconsistent with the opinion (R. 51). The judgment was by a majority of the court, Morton, Circuit Judge, dissenting. The present petition asks this Court to reverse the decision of the Circuit Court of Appeals.

Constitutional Provision and Statutes Involved.

Constitution of the United States, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Judicial Code, section 269, as amended (U.S.C. Title 28, sec. 391):

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law . . ."

United States Code, Title 28, sec. 770:

> "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy shall be by jury."

Question Involved.

The sole question involved is whether, in an action to recover for personal injuries, the judge of the District Court has power to make an order that, if the defendant will consent to increase the damages as found by the jury by an amount specified by the court, the plaintiff's motion for a new trial is to be denied, but otherwise to be granted, and, upon the defendant's consenting, to enter judgment, over the plaintiff's objection, for the increased amount.

Summary of the Argument.

I. There can be no doubt that the action of the trial court was subject to review by the Circuit Court of Appeals. Appellate courts have power to review rulings of law made in connection with motions for a new trial. The trial judge clearly indicated that he was making a ruling of law as to his power and the proper disposition of the motion. After a finding that the verdict was erroneous, the proper disposition of the motion was a matter of law rather than of discretion. The respondent's contention that the order deprived him of a constitutional right required consideration by the appellate court.

II. No precedent at common law has been cited for the order of the trial court, and none can be found. The two cases cited by the judge do not support it. A review of English, federal, and state cases shows that they are in fact opposed to the exercise of any such power. This lack of precedent is sufficient ground for, and requires, affirmance of the judgment of the Circuit Court of Appeals.

III. The federal statute governing new trials furnishes no authority for the order. The statute in effect incorporates the practice of courts of law generally, subject to the Constitution of the United States, but the general law as shown above, does not sanction the practice which the trial judge seeks to introduce.

IV. The order violates rights secured to the respondent by the Seventh Amendment. The order, in effect, is a determination of the quantum of damages by the court, and deprives respondent of the right to have them correctly assessed by the jury. It also amounts to a re-examination of a fact tried by a jury otherwise than according to the rules of the common law. The order is not justified by the analogy of *remittitur* cases. The decision of the Circuit Court of Appeals is rightly placed also on the constitutional ground, and should be affirmed.

Argument.

I. The action of the trial court in disposing of the motion for a new trial was subject to review by the Circuit Court of Appeals.

While no argument was made in the Circuit Court of Appeals attacking its power to review the disposition made by the trial court of the respondent's motion for a new trial —and the present brief for the petitioner merely suggests incidentally that such power may be wanting—we concede that it was the duty of that court to notice its own want of power to review, if in fact it had no such power.

But there is ample authority sustaining the power to review the order made in this case. The proposition that no federal appellate court may review for error of fact the action of the trial court in granting or denying a new trial, a rule in no way impugned by the respondent, necessarily implies the correlative proposition that the appellate court may review and correct rulings of law made in connection with such action.

> *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482 (1932).

In the opinion last cited this Court said:

> "Under certain circumstances the appellate court may enquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion, *Mattox* v. *United States*, 146 U.S. 140; *Ogden* v. *United States*, 112 Fed. 523; or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced, *Felton* v. *Spiro*, 78 Fed. 576, 581;

Dwyer v. *United States,* 170 Fed. 160, 165; *Paine* v. *St. Paul Union Stockyards Co.,* 35 Fed. (2d) 624, 626-628."

The following language from *Felton* v. *Spiro* we believe correctly summarizes the reviewability of action in connection with motions for a new trial:

> "It is only when the court in the exercise of its discretion to grant or refuse a new trial does so upon all competent evidence, and under a correct view of the law, that its judgment is not the subject of review, and when, instead of leaving it to be presumed that the court below acted under a correct conception of the law, that court distinctly states on record the view of the law by which the court was controlled, no reason is perceived why this is not subject to review" (73 Fed. at 95).

Of course, the making of the conditional denial of a new trial carries with it the ruling that the trial judge has power to make such an order. But the trial judge in this case went further. "On the authority of *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, and *Carr* v. *Miner,* 42 Ill. 179," is clearly an indication that the judge believed and was ruling as matter of law that he had power to require the plaintiff, if the defendant agreed, to accept such damages as he, the judge, should award instead of submitting the question to another jury. There could scarcely be a plainer statement on the record of the view of the law and authorities by which the action of the court was controlled.

If the ruling of the trial judge in *Felton* v. *Spiro,* 78 Fed. 576, *supra,* and in the *Dwyer* (170 Fed. 160) and *St. Paul Union Stockyards* (35 Fed. (2d) 624) cases, to the effect that he had no power to grant or deny the new trial for the

reasons stated, was properly subject to review, equally so must be the ruling that the trial judge has power to deny the new trial, which he otherwise would grant, because the defendant has agreed to pay something more than the jury awarded against him.

The decision of this Court in the *Fairmount Glass Works* case, *supra* (287 U.S. 474), does not prevent review of the trial court's order. The Circuit Court of Appeals here has not done and was not asked to do what the appellate court did in that case. In that case the trial court absolutely denied the new trial. In its view, the damages awarded by the jury were not clearly inadequate. It made no ruling of law. Consequently, no error was committed which an appellate court could revise, and this Court so held.

In the present case, in order to make even the conditional order for a new trial, the trial court must have found as a fact at least one of the reasons urged by the respondent for his motion, namely, that the damages are inadequate. The fact that a new trial was to be granted on both liability and damages is perhaps consistent with the inference that he may have found also that the verdict is against the evidence and the weight of the evidence. But it can probably be assumed, in favor of his action, that he did not find that the verdict was a result of compromise or illegality, but rather that the jury merely erred in assessing the damages; otherwise the verdict could not stand at all.

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. *Moquin,* 283 U.S. 520 (1931).

Schuerholz v. *Roach,* 58 F. (2d) 32, 34 (1932, C.C.A. 4).

It is not true, however, as stated in the petitioner's brief (page 4) that "nothing except inadequacy of damages is argued by the respondent." The respondent's position at the argument before the Circuit Court of Appeals was, and

it still is, that the trial court must have found to be true some one of the three grounds alleged in the motion for new trial, or else he would not have disturbed the verdict even conditionally. From the nature of the order made, it is highly probable that the court found that the damages were inadequate. But as no alleged error is predicated upon the finding—and of course none could be so predicated under the rules above stated—it is unnecessary to inquire further what was the finding of the trial court.

The trial court did, however, find the verdict erroneous for some reason, and having found it erroneous, could not thereafter have denied the new trial absolutely and entered judgment thereon. The occasion was no longer appropriate for the use of judicial discretion in deciding whether to grant or deny the new trial. The proper judicial action was required, and the duty of the trial judge imperative. Whether, in making the conditional order here made, he performed that duty is, on all the authorities, a proper subject for inquiry by the appellate courts.

Stetson v. *Stindt*, 279 Fed. 209, 212 (1922, C.C.A. 3).

United Press Ass'ns v. *National Newspapers Ass'n*, 254 Fed. 284, 286 (1918, C.C.A. 8).

Glenwood Irr. Co. v. *Vallery*, 248 Fed. 483, 485 (1918, C.C.A. 8).

Pugh v. *Bluff City Excursion Co.*, 177 Fed. 399, 401 (1910, C.C.A. 6).

It is true that the cases cited were all cases where the jury brought in a verdict awarding less damages than the amount required by the specific instructions of the court. But there is no distinction between such a case and that now before the Court, where the trial judge has found, in effect, that the damages awarded were less than the amount required by

the facts in the light of applicable law. In both cases, the jury have erroneously applied the law given them. If the appellate courts could review the trial court's action in denying a new trial in the former cases, the power to review must also exist in the present case.

We submit, moreover, that there is no merit in the suggestion by the petitioner that the case of *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U.S. 69, 76, presents objections to reviewing the order in question. We repeat that the respondent has not asked the Circuit Court of Appeals, and that court has not undertaken, to review the judge's finding that the verdict was erroneous. But we do maintain that whether he took the proper action in disposing of the motion for a new trial after making such a finding is a question of law which may be passed on by the appellate courts. If there is any logical inference from language in the Arkansas case—and we believe there is none—that the trial judge might have made a finding that the verdict was excessive and, nevertheless, have rendered judgment thereon for the full amount without any fear of revision on appeal, we can only urge that such language was unnecessary to the decision and that it should not and does not represent the law.

Finally, it must be remembered that the respondent has urged constantly that the order made by the trial court denies him a right, secured him by the Constitution, to have his damages assessed correctly by a jury. The right which the respondent demands is that right which, in the language of the late Chief Justice (see *Felton* v. *Spiro,* 78 Fed. 576, at 581), is "accorded to a party litigant for the correction by the trial court of injustice done by the verdict of the jury. It is one of the most important rights which a party to a jury trial has."

That the respondent's contention is not frivolous is clear from the fact that the majority of the judges in the Circuit

Court of Appeals have been persuaded thereby. The respondent certainly is entitled to have a competent court pass on the merits of his contention. It is unthinkable, therefore, that federal appellate courts should be precluded from reviewing such an order as that made in this case when such order is claimed to violate rights secured by the Constitution.

In summary, therefore, the power of the Circuit Court of Appeals to review the present order is fully sustained—

(1) Because the trial court expressly indicated that he was making a ruling of law;

(2) Because his finding that the verdict was erroneous called for proper action in disposing of the motion for a new trial; and—

(3) Because the order made was claimed to violate the constitutional rights of the respondent.

II. No precedent has been cited for the order of the District Court, and none can be found.

The Circuit Court of Appeals put its decision on two grounds: that the action of the trial judge was not warranted by any precedent in the common law or by statute, and that, being unknown to the common law, it was a practice precluded by constitutional limitations embodied in the Seventh Amendment.

The first ground is not refuted by the petitioner, and alone is sufficient to sustain the judgment. Unless there is common-law or statutory sanction, the power of a federal court, or any court, to increase a verdict without the consent of the parties cannot exist.

The researches of counsel for both parties have failed to show any precedent for the action of the trial court. The independent extensive search made by the circuit judges (R. 42, 46; 70 F. (2d) 560, 562) discovered no case to support

it. The trial court purported to base his order on the authority of *Gaffney* v. *Illingsworth*, 90 N.J.L. 490, and *Carr* v. *Miner*, 42 Ill. 179, indicating that to his mind the power to make the order existed by virtue of general principles of the common law. Though the brief for the petitioner (page 15) practically concedes that the two cases cited do not support the ruling of the trial judge, we propose to show, not only that these cases are beside the point, as the Circuit Court of Appeals found (R. 40, 70 F. (2d) 559), but also that such general authorities as might be considered pertinent to the issue are unanimously opposed to the ruling.

Gaffney v. *Illingsworth*, 90 N.J.L. 490 (1917), was a case where the plaintiff's rule for a new trial had been granted, subject to be denied if the defendant should pay the plaintiff a sum in excess of the jury's verdict within ten days after the court's order. The defendant, instead of paying, appealed from the order, and the rule for a new trial became absolute. The decision of the New Jersey court goes no further than to hold that the trial court acted within its discretion in granting a new trial, under the New Jersey statute, and that the exercise of its discretion could not be reviewed. No question was raised or discussed as to the plaintiff's right to object to such an order. A careful examination of New Jersey decisions citing this case shows that no subsequent decision has followed it as authority for making such an order.

Carr v. *Miner*, 42 Ill. 179, was decided by the Supreme Court of Illinois in 1866. The defendant had conceded his liability for interest at 10%, but the jury erroneously computed the interest at 6%. The trial court denied the plaintiff's motion for a new trial on condition that defendant would consent to increase the verdict by an amount equal to the difference between interest figured at 6% and at 10%. The defendant consented. On the plaintiff's appeal, the

order was affirmed. That the decision was strictly limited to the facts of the case appears from the following language of the court (p. 192):

> "If there were no other grounds requiring a new trial to be granted, and we see none, then, when that was corrected, there was no error in overruling the motion. It was a case in which the amount could be calculated with certainty when the basis was found. The pratice is one that should be sparingly indulged, and should never be adopted except in clear cases."

This case was followed in *James* v. *Morey,* 44 Ill. 352, 354, decided in 1867, where the error in the jury's verdict could be corrected by reference to the terms of a lease. It is significant that never since *James* v. *Morey* has the *Carr* case been cited in Illinois for the proposition for which it has now been taken as authority by the trial court in the case at bar.

From the foregoing analysis of the cases cited by the trial judge, the conclusion is apparent that they do not justify his order. We proceed, therefore, to the examination of the authorities generally, which for convenience will be divided into three parts, dealing respectively with English, federal, and state cases.

(*a*) *English cases.*

It takes but slight investigation of the English law to prove that such action as the trial court took in disposing of the respondent's motion for a new trial would not be tolerated in England.

Watt v. *Watt,* [1905] A.C. 115, a decision by the House of Lords, holds that the court has no power to alter a jury's verdict without the consent of *both* parties except by ordering a new trial.

Although this case has been criticized and condemned in the opinion of the dissenting circuit judge and in the brief for the petitioner, the fact remains that it represents the result of a careful review of the existing English authorities. That it further represents the law of England is clear from *Lionel Barber & Co.* v. *Deutsche Bank,* [1919] A.C. 304, 314.

Much emphasis has been placed by the petitioner in his brief (page 9) on certain old English cases referred to in Annotated Cases 1916 B, at page 384, and the dissenting opinion also refers to Buller's Nisi Prius (7th edition) p. 21*a* (R. 50, 70 F. (2d) 56). A challenge was presented by the possibility that these might reveal some ancient decision to support the trial court's order.

The cases referred to in these passages are:

Tripcony's Case, Dyer, 105*a* (1554).
Hooper v. *Pope,* Latch, 223 (1627).
Davis v. *Foliot,* Style, 310 (1651).
Jervis v. *Lucas,* Style, 345 (1652).
Austin v. *Hilliers,* Hardres, 408 (1665).
Cook v. *Beal,* 1 L. Raym. 176 (1697).
Burton v. *Baynes,* 1 Barnes, 153, Buller's N.P. p. 21*a* (1733).
Smallpiece v. *Buckingham,* Buller's N.P. 21*a*.
Brown v. *Seymour,* 1 Wils. (1742).

In these cases, all of which were actions for mayhem, the court *en banc* seems to recognize a right on its part to increase the plaintiff's damages "*super visum vulneris.*" That these cases furnish no precedent for the action of the District Court is, however, clear for four reasons:

(1) The increase could only be made by the court *en banc* and never by the trial judge. *Cook* v. *Beal,* 1 L. Raym. 176, *supra.* (That an increase may not be made by a federal

appellate court was the express holding in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, *supra.*)

(2) The damages could be increased only in mayhem cases.

Austin v. *Hilliers,* Hardres, 408, *supra,* where Chief Baron Hale says:

> ". . . but if the Declaration does not expresly alledge a Mayhem, there we cannot increase them."

Jervis v. *Lucas,* Style, 345, *supra.*
Cook v. *Beal,* 1 L. Raym. 176, *supra.*

(3) In all the cases the plaintiff was the party who asked the court to re-examine his wound and make the increase. The plaintiff thus expressly waived his right to have another jury pass on the question, if, indeed, at the date of these cases, the right to a new trial because of the inadequacy of the damages awarded could be said to have been established.

(4) The practice of increasing the damages in mayhem cases was obsolete even at the time the Constitution was adopted. The last known case is *Brown* v. *Seymour,* 1 Wils. 5, *supra,* in 1742, and the court there refused to increase the damages.

Mayne, on Damages (10th ed. 1927), 579.
Cf. *McCoy* v. *Lemon,* 11 Rich. (S.C.) 165, *infra.*

That the obsolete rule applied in mayhem cases was never carried over to other cases is further indicated by *Jackson* v. *Williamson,* 2 T.R. (Durnford & East) 281 (1778). This was an action against a sheriff for wrongfully selling a lighter. The sheriff's sale brought only £31, but the evidence showed the fair value to be £60. The jury found a verdict of £30, and the plaintiff obtained a rule to show

cause why the verdict should not be amended to the larger figure. The court refused to permit the increase.

Baker v. *Brown,* 2 M. & W. 199 (1836), involved a motion by the plaintiff to increase his damages by adding interest. The defendant had defaulted and the failure to include interest was due to the inadvertence of counsel. The court denied the motion.

Phillips v. *South Western Ry. Co.,* 4 Q.B.D. 406, and 5 Q.B.D. 78 (1879), was an action by a physician for personal injuries. The jury awarded £7000 and the plaintiff moved for a new trial on the grounds of the inadequacy of the award. The court found that the jury had failed to include certain items of damage. The court, nevertheless, concluded (per James L.J.):

> "I am of the opinion and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate and have no business to say."

This investigation of the English cases leads to the result that there is no English authority to conflict with the logical conclusion from *Watt* v. *Watt,* [1905] A.C. 115, *supra,* namely, that the order which the trial court made in this case would not now be, and never was, permissible in England.

Belt v. *Lawes,* 12 Q.B.D. 356 (1884), a decision expressly overruled in *Watt* v. *Watt* as not consistent with the prior authorities, has finally been seized upon by the petitioner and the dissenting judge in a labored search for English authority to support the ruling in question. One of the Lords Justices in his opinion supposes a case not unlike the present, and concludes: "I am far from saying that the Court would not have power in favor of the defendant and

in his interest, to say that the damages given are too small, but that if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused." That there was nothing to support this dictum is apparent from the criticism of the case by Lord Davey (see [1905] A.C. 122):

> "No authority for the proposition laid down in *Belt* v. *Lawes* is quoted by the learned judges in that case, and no authority earlier than that case was brought to our attention by Mr. Matthew in his very careful argument. On the other hand there are numerous dicta of learned judges to the contrary."

Although the argument carries some persuasion that a decision by the House of Lords in 1905 should not be used to determine the meaning of the Constitution in 1789, the fact remains that the English law, unfettered by limitations of a Seventh Amendment, not only furnishes no precedent for the practice which the district judge has attempted to institute, but actually condemns it as violative of fundamental rights.

(*b*) *Federal cases.*

The petitioner in his brief (page 6) frankly admits that there is no federal precedent for the action of the judge of the District Court, but maintains that there is nothing against it. As it is unusually difficult to dissociate the approach of the federal cases to the present problem in its general aspects from the approach in its constitutional aspect, only a few federal cases can be adequately discussed at this point.

Stetson v. *Stindt,* 279 Fed. 209 (1922, C.C.A. 3), was an action based on a promissory note where the plaintiff should

have recovered the amount of the note or nothing. The jury were so instructed, but returned a verdict for one-half the amount of the note. The Circuit Court of Appeals for the Third Circuit held that refusal by the trial court to grant a new trial under such circumstances constituted reversible error, saying:

> (P. 211) "It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court."

Glenwood Irrigation Co. v. *Vallery,* 248 Fed. 483 (1918, C.C.A. 8), was a case based on negligent injury to property where, although the defendant's liability was in issue, the amount of damages was definitely ascertained. During the trial it appeared in evidence that the plaintiff carried a certain amount of insurance on the property injured. The trial court instructed the jury that, if the plaintiff was entitled to recover anything, he should be awarded the ascertained amount of damages, and that no deduction could be made because of the existence of insurance. The verdict, however, was obviously the result of deducting the amount of the insurance from the ascertained amount of damages. Both parties excepted to the verdict and sued out writs of error to review the judgment entered upon it. The Circuit Court of Appeals ordered the judgment reversed on plaintiff's writ of error, with direction to grant a new trial.

In these cases the only issue to be determined by the jury was the question of liability, and that in each case was resolved in favor of the plaintiff. The damages were liquidated and ascertained. If the power to increase the verdicts to the correct figure existed, the facts of these cases clearly called for the exercise of such power. Yet in none of

the cases did the court attempt to alter the verdict; in each case it merely set aside the verdict and ordered a new trial.

Somewhat similar to these cases was the decision in *Original Sixteen to One Mine, Inc.*, v. *Twenty-One Mining Co.*, 254 Fed. 630 (1918, Dist. Ct. N.D. Cal.). The jury returned the following verdict:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of $100,000, less cost of extraction of the ore, on account of unwillful trespass."

The cost of extraction of the ore was disclosed by the defendant's statements, and the plaintiff moved for a judgment in the amount of $100,000, less the cost as disclosed on the statements. The defendant moved for a new trial. On granting the latter motion the court said (p. 633):

> "If the jury finds in favor of the plaintiff and there is no dispute over the amount of the recovery, it seems somewhat technical to deny to the court the power to supply the omission from the undisputed facts, but such seems to be the law of the land."

Discussion of the remaining federal cases which may be regarded in point will be postponed until the constitutional aspect of the case is reached. But from the few cases already discussed, it seems that the failure of the federal courts to exercise the power of increasing the verdict to an amount liquidated and admittedly correct must be regarded as convincing proof that they have no power to increase the verdict where the sum due, if any, is wholly unliquidated. Therefore, though none of the cases deals with the power of the court to make a conditional denial of a new trial, it is submitted that they are all opposed in theory to the existence of any such power.

(c) *State cases.*

As the court will not be assisted by a discussion of state cases where a verdict was increased with the consent of both parties, or cases where, though a conditional order was made, the defendant declined to comply with the condition, so that the order ultimately stood as an order for a new trial, we shall for completeness merely collect them in the footnote.* These cases are not urged, either by the dissenting judge in the Circuit Court of Appeals or by the petitioner, as authority for making such an order without the plaintiff's consent. The plaintiff in these cases obtained the new trial which he sought, and had no occasion to object to the order. That such an order would not be enforced without the plaintiff's consent is apparent from the language of the Wisconsin court in a recent case among this group:

> "Where, in a case involving unliquidated damages, the amount found by the jury is deemed by the court wholly inadequate, it seems clear that the trial court may grant a new trial unless the plaintiff consents to take judgment for such increased amount found by the court to represent the least amount that an unprejudiced jury would probably find. Since the court finds the 'least amount' the plaintiff must be given an option to consent to the amount of damages found by the court. In such a situation the defendant may not complain because the court has only increased the damages to the least amount which it will permit to stand in lieu

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*Cases where the verdict was increased with the consent of both parties are *Adamson* v. *County of Los Angeles*, 52 Cal. App. 125; *Richards* v. *Sandford*, 2 E. D. Smith (N.Y.) 349, *semble*.

Cases where the conditional order denying a new trial if defendant would consent to increase the damages became an absolute order because the defendant refused to consent are *Gaffney* v. *Illingsworth*, 90 N.J. L. 490; *Risch* v. *Lawhead*, 211 Wis. 270, 278 (1933); *Campbell* v. *Sutliff*, 193 Wis. 370; *Reuter* v. *Hickman, Lauson & Diener Co.*, 160 Wis. 284; *Gosczinski* v. *Carlson*, 157 Wis. 551; *Hillman* v. *City of Seattle*, 163 Wash. 401; *Clausing* v. *Kershaw*, 129 Wash. 67; *Bernard* v. *No. Yakima*, 80 Wash. 472; *Ford* v. *Minn. St. Ry. Co.*, 98 Minn. 96.

of granting a new trial" *Risch* v. *Lawhead*, 211 Wis. 270, 278 (1933).

Such cases as are strictly in point—where, over the plaintiff's objection, the court has attempted to dispense with a new trial upon the defendant's consenting to an increase in the damages to a figure satisfactory to the court—have uniformly held, upon appeal by the plaintiff, that the trial court's action could not be sustained.

Both the dissenting judge in the Circuit Court of Appeals and the petitioner undertake to distinguish the leading case, *Shanahan* v. *Boston & Northern St. Ry. Co.*, 193 Mass. 412 (1907). That was a case where, in actions to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, the jury returned verdicts for the defendant and the plaintiffs moved for a new trial. Thereupon an order was entered granting the motions unless on or before a certain date the defendant consented to the entry of judgment in favor of the plaintiffs in specified amounts. On appeal by the plaintiffs this order was held to be error.

The dissenting judge (R. 50, 70 F. (2d) 564) says that the distinction between that case and the case at bar is that there "the finding of the jury on liability was disregarded by the trial judge in an effort to impose his views on the parties" while "Here the trial judge accepted the jury's verdict as to liability. The part of his order which is objected to relates only to damages." The judge based his conclusion upon his further argument that "The law recognizes a distinction between questions of liability and amount of damages, *e.g.*, agreements for arbitrating the former were at one time regarded as against public policy, but agreements for the arbitration of damages were held valid."

The position taken by the petitioner in his brief (page 17), is similarly based upon the supposed distinction between re-examination of the fact of liability and superintending the jury's estimate of damages. Elsewhere in the brief he frankly states his theory that, in a tort case "liability or no liability is surely a fact . . . but when we come to placing an estimate in dollars and cents upon the extent of damage we may all be at a loss to know as to whether there is any such certainty or fixed character about this feature of the case as to dignify a jury's estimate of the monetary value of damages as a 'fact' " (page 9).

Neither the dissenting judge nor the petitioner cites a single case as authority for this alleged distinction; and we believe none can be found. On the contrary, as stated in Reeve's History of the Common Law (quoted in *Watt* v. *Watt*, [1905] A.C. 119):

> "There was always this distinction between trial by jury and mere inquisition or inquiry by a jury to assess damages (i. e., after default) that in the latter case the inquisition was only to inform the mind of the Court and it was at their discretion whether they would award judgment for the amount found by the jury whereas upon a trial they had no jurisdiction to interfere as to the amount of damages."

The question remains whether there is a substantial distinction between the *Shanahan* case and the case at bar. True, in the *Shanahan* case the jury's verdict had been unfavorable to the plaintiff on both liability and damages. The trial judge then did two things: (1) substituted a favorable for an unfavorable verdict on liability, (2) substituted verdict for $200 and $500 in the cases, respectively, for a verdict of no damages in each case. On plaintiffs' appeal, the Massachusetts court held that they had been prejudiced by

the trial judge's action. For the purposes of this comparison the important inquiry is wherein the plaintiffs were prejudiced. Certainly they were not prejudiced by the ordering of verdicts in their favor on the question of liability. It is obvious that the actual prejudicial factor in the *Shanahan* case, as in the case at bar, was the imposition on the plaintiffs of an amount of damages unacceptable to them, and never determined by a jury.

The cases, therefore, are closely akin, and, as the action of the trial court was held prejudicial to the plaintiffs in the *Shanahan* case, so the action of the District Court must be held to have injured the plaintiff in the case at bar.

Somewhat analogous to the *Shanahan* case was the earlier decision of *Phillips* v. *Granger,* 134 Mass. 475 (1883). This was an action on a promissory note for $400. The defendants set up a counterclaim for $368. The jury returned a verdict for the defendants, which the court set aside. The defendants moved that they be allowed to remit $32, and that judgment should be entered for the plaintiff in this amount. The plaintiff would not consent. The court denied the motion, and its action was held right.

Minot v. *Boston,* 201 Mass. 10 (1909), was a petition for damages on taking of an easement by eminent domain, where the verdict failed to include interest from the date of the taking. Upon motion by the plaintiff, the court made an order directing the clerk to add interest to the amount of the verdict. The Supreme Judicial Court said (p. 12):

> "No authority is given to add to this verdict a further sum. The assessment of the amount due is not to be made in part by the jury and in part by the court, but wholly by the jury."

Werner v. *Bryden,* 84 Cal. 472; 258 P. 138 (1927), was an action for seduction. On plaintiff's motion for a new

trial, the court ordered that the motion should be granted unless the defendant would stipulate that judgment for $1500 might be entered for the plaintiff. The defendant stipulated and judgment was entered. On plaintiff's appeal, the judgment was reversed and a new trial ordered, the appellate court saying:

> "The question is not whether the amount fixed by the court is a reasonable sum to be allowed as damages, but the plaintiff has the constitutional right to have such damages assessed by a jury."

In *Lorf* v. *City of Detroit,* 145 Mich. 265 (1906), an action for personal injuries, the jury found for plaintiff, but awarded her six cents damages. The trial court, satisfied that the plaintiff had sustained substantial damage, ordered a new trial "unless the defendant shall elect to pay $100 in settlement of the case with actual cost of the plaintiff and her witnesses." The Michigan Supreme Court reversed this order and granted a new trial, saying (at p. 267):

> "We have been unable to find any case sustaining this holding and we think it was unauthorized and erroneous."

Goldsmith v. *Detroit, Jackson & Chicago Ry.,* 165 Mich. 177 (1911), was an action to recover for personal injuries. On motion of the plaintiff for a new trial on the issue of damages, the trial court ordered "that a new trial be granted to the said plaintiff in said cause unless the said defendant within 10 days from this date pay to the said plaintiff the sum of $300; . . . and if said plaintiff declines and refuses to accept the same, then it is ordered and decreed by this court that the motion for a new trial is denied." The upper court, reversing this order, said (p. 179):

> "When a trial judge, before whom a case has been tried, is of the opinion that substantial justice has not been done, and it is his opinion that a new trial should be had, we are very loath to disagree with him. By annexing a condition that defendant should pay plaintiff $300., the trial court has made it manifest that in his opinion substantial justice was not done in the premises. We cannot, however, agree with him as to his right to annex such a condition. It was equivalent to the trial court himself assessing the damages. This is the province of the jury."

And to the same effect is the decision in *Stanton* v. *Foley*, 168 Mich. 453, 456 (1912).

In view of the reliance placed by the petitioner and the dissenting judge in the few old English mayhem cases referred to above, the decision of the South Carolina court in *McCoy* v. *Lemon*, 11 Rich. 165 (1856), though not strictly in point, may be of considerable interest. In consequence of a brawl between the plaintiff and defendant, the former lost the sight of one eye and a thumb. In an action for the injury he was awarded only thirty dollars by the jury, and obtained a rule to show cause why the damages should not be increased. The court refused to increase damages on the theory that "no court possesses the power to increase or diminish the damages in due form found by a jury in any other way than by granting a new trial." The appellate court likewise refused to order an increase in the damages, saying (p. 174):

> "Not a single case has been found in any book of American Reports in support of the present motion . . . Neither has there been for more than a century any recognition of the rule by any case in England."

This review of the English and American cases must confirm the statement that the order of the trial judge in the

present case is wholly without precedent. The fact that no court has ever been permitted, over the plaintiff's objection, to fix a sum to be paid by the defendant as a condition of denying the plaintiff's motion for a new trial, we repeat, establishes conclusively that the courts have no such power under the Anglo-American system of jurisprudence, and furnishes an argument against the judgment in question which the petitioner has not answered and which, the respondent believes, is unanswerable.

III. The federal statute governing new trials does not authorize the order of the District Court.

The Judicial Code, sec. 269, as amended (United States Code, Title 28, sec. 391) reads (so far as material to this case):

> "All United States Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law . . ."

The power of a federal trial court to grant a new trial, thus being established by a law of the United States, is not subject to state law and not controlled by the Conformity Act.

Indianapolis & St. Louis R.R. Co. v. *Horst,* 93 U.S. 291, 301 (1876).

United States v. *Train et al.,* 12 Fed. 852, 853 (1882, C.C. Mass.).

(The present case, of course, presents the question in negative form, that is, reasons for which new trials have usually been *denied.* But it seems reasonable to infer that the rule applies to the power to *deny,* as well as to *grant,* new trials.)

Although federal practice regarding new trials is not governed by the Conformity Act, the argument on page 17 of the petitioner's brief is by no means true that state court citations are of no value in connection with this problem, and that "There is sufficient discussion of the powers of the Court in the decisions of this Court and the Federal Courts to solve the problem with the assistance of the logic of the Constitution and the history of jury trial at common law, with reference to the action of the State Courts."

The language of the federal statute indeed makes that statute a sort of conformity act, referring, as it does, to the "reasons for which new trials have usually been granted in the courts of law . . ." (U.S.C. Title 28, sec. 391). This language does not confine the inquiry to the practice of federal courts, but makes relevant an inquiry into the practice of courts of law generally. And since this is a statute, and not the Constitution, which is being interpreted, the inquiry would not appear to be confined to the practice of courts of law in 1789, at the time the statute was first adopted. Certainly the district judge, who must be assumed to have been cognizant of the federal statute, took the view that decisions of the Illinois and New Jersey courts in 1866 and 1917, respectively, could be cited as authority for his ruling on a motion for a new trial in his court. We concur with his view so far as it admits the usefulness of state court decisions in construing the federal statute, although denying the authority of the particular two cases cited. This view, of course, is subject to the limitation that decisions from the state or English courts, to form the basis of action under the somewhat broad language of the federal new trial statute, must not violate the Seventh Amendment to the Constitution of the United States.

The authorities examined in the second point of this brief, *supra,* subject to the Seventh Amendment, are therefore important in determining the construction of the

language of the statute: "reasons for which new trials have usually been granted in the courts of law." It is unnecessary to repeat in detail the discussion of general authority, both in this country and in England. Its application here is obvious. Since the courts of law of states of this country and the highest English court have not only failed to sanction the action taken by the District Judge, but actually have denounced such action when the question was raised, it is obvious that his ruling on the respondent's motion for a new trial was wrong under the statute because utterly unfounded on precedent in the courts of law.

IV. The order of the District Court violates rights secured to the respondent by the Seventh Amendment to the Constitution.

The judgment of the Circuit Court of Appeals, as we have stated above, was placed on two grounds: That the action of the trial judge was not sanctioned by precedent or statutory authority and that it amounted to a usurpation of functions of the jury and a re-examination of facts in violation of the Seventh Amendment to the Constitution.

The respondent urged in his brief in opposition to the writ of certiorari and still believes and urges that the first ground requires, and of course is sufficient reason for, affirmance of the judgment, apart from the constitutional ground.

But the Seventh Amendment requires that —

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Two rights are guaranteed the respondent by this constitutional provision: A right to have all the issues in controversy settled by a proper verdict of a jury and a right that no fact tried by a jury should be otherwise re-examined than according to the rules of the common law.

We maintain first that, when the district judge caused judgment to be entered for the respondent for an amount of damages determined by himself after finding, as he must have found, that the verdict of the jury was erroneous, he invaded the province of the jury and deprived the respondent of his right, guaranteed by the Amendment, to have his damages correctly determined by a jury.

Questions concerning the respective province of court and jury have from time to time come before this Court, and the Seventh Amendment has been held not to prohibit the adoption of modern forms of procedure where the substance of the constitutional right is preserved.

> *Gasoline Products Co.* v. *Champlin Co.*, 283 U.S. 494, 498 (1930).
> *Ex parte Peterson*, 253 U.S. 300, 309 (1920).

Certain fundamental propositions have, however, never been departed from, and among them is the rule that "The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver . . . of verdict by the jury." *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882). Or, as restated by Justice Matthews in *Baylis* v. *Travellers' Ins. Co.*, 113 U.S. 316, 320, 321 (1884):

> ". . . But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon.

> "That is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury."

Walker v. *Southern Pacific Railroad,* 165 U.S. 593 (1897), is cited in both opinions rendered in the Circuit Court of Appeals because of its liberality. The Court there says of the Seventh Amendment (p. 596):

> "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

The same principle was further recognized in *Slocum* v. *New York Life Ins. Co.,* 228 U.S. 364, at 387 (1912), where, in discussing the cases cited above, the Court said:

> "They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direc-

> tion, the court cannot dispense with a verdict or disregard one when given and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury unless the right thereto be waived."

It is, moreover, of great significance that the dissenting justices in the *Slocum* case, in an opinion written by the present Chief Justice, based their argument largely on the proposition that, after the appellate court decided that a verdict should have been directed, "there was no fact to be tried by a jury; the case as made was barren of any such fact" (228 U.S. 401), and distinguished cases cited in the majority opinion on the ground that such cases had "obvious reference to cases of disputed questions of fact with which it is the province of the jury to deal. Facts once tried by a jury are not re-examined and the court is not to substitute its judgment of the facts for the judgment of the jury, but, in such case, should order a new trial" (228 U.S. 423).

The unanimous opinion of the nine justices who heard the *Slocum* case, therefore, supports the respondent's contention that the trial judge was not at liberty to substitute his estimate of the damages suffered by the respondent for the judgment of a jury as to the amount of such damages, and that in so doing he deprived the respondent of a constitutional right.

The petitioner has argued in his brief (pages 10-11) that the respondent cannot urge he has been deprived of a trial by jury because the jury found in his favor on the question of liability and merely erred in assessing damages. It may be assumed that the respondent would have been delighted if his motion for a new trial had been granted upon the limited issue relating to damages. But the order of the District Court was that, if the defendant declined to stipulate, the case was to be "tried *de novo* both on the question

of liability and damages," thus indicating to his mind that the two issues were inseparable. The finding, necessarily implied from the order, that the verdict was erroneous leads to but one conclusion, namely, that the issues of fact were not found by the jury and that they, or at least some issues, remained to be determined. In such case he could no more cause judgment to be entered for the amount of damages determined by himself than a trial judge can enter judgment for one party when the verdict is rendered for the other though erroneous in law.

Cf. *Pederson* v. *Delaware, L. & W. R. Co.*, 229 U.S. 146, 153 (1912).

Where the governing principles which must decide this case are so clear from decisions of this Court, it is perhaps unnecessary to cite additional cases from the lower federal courts in support of the respondent's contention.

Stetson v. *Stindt*, 279 Fed. 209, 212, *supra*, a decision by the Circuit Court of Appeals for the Third Circuit, and *Glenwood Irrigation Co.* v. *Vallery*, 248 Fed. 483, 486, *supra*, in the Eighth Circuit, have already been discussed, as showing that the court has no power to increase the damages even when the amount is undisputed.

To the same effect is *Ohio Valley Bank* v. *Greenbaum Sons Co.*, 11 F. (2d) 87, 89 (1926, C.C.A. 4), where the jury found separate verdicts against two defendants, the sum of which equaled the plaintiff's claim, for which the defendants, if liable at all, were jointly liable. The plaintiff moved to have the court enter judgment for the sum of the verdicts against both defendants. The court said:

> "This in effect would be to set aside the verdict of the jury and substitute for it the judgment of the court in establishing the extent of the liability . . . This cannot be done. Constitution of the United States, Amendment 7."

Since no power exists in the court to render judgment for an amount in excess of the verdict when the damages are liquidated or undisputed, clearly no such power can exist where the damages are unliquidated as in a personal injury case. The attempt of the court to exercise such a power must, therefore, be regarded as a usurpation of the function of the jury, and, where such exercise is without consent of a party, it certainly amounts to a deprivation of his right to trial by jury.

We now turn to consider the second part of the Seventh Amendment, which prohibits the re-examination of facts tried by a jury otherwise than according to the rules of the common law. There is no dispute that the quantum of damages was one of the facts tried by the jury, upon which their finding was $500. This fact could therefore be re-examined by the trial judge only according to the rules of the common law. We maintain, therefore, that when the district judge caused judgment to be entered for an amount of damages determined by himself, he further violated the rights of the respondent under the second part of the Amendment.

Kennon v. *Gilmer,* 131 U.S. 22 (1889), strongly supports this position. In this case the plaintiff recovered a large verdict, but the territorial Supreme Court, under statute authority to deal with motions for a new trial, ordered the judgment reduced by $10,000. Both parties appealed, and this Court reversed the order, saying (p. 27):

> "The judgment of the Supreme Court of the Territory, reducing the amount of the verdict and the judgment of the inferior court thereon, without submitting the case to another jury or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest was irregular and so far as we are informed unprecedented . . . And in a case in which damages for a tort have been assessed by a

> jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."

No ground for distinction exists between the court's action in the *Kennon* case and that attempted by the trial court here. In the former the court compelled the plaintiff to accept a different sum from that awarded by the jury. So in the case at bar. Nothing turns on the fact that in one case the sum was less and in the other greater than the amount of the verdict. The difficulty in each case is that the court is re-examining a fact found by a jury otherwise than "according to the rules of the common law."

This phrase has been interpreted in numerous decisions, but perhaps no interpretation is so concise as that by Justice Story in *Parsons* v. *Bedford,* 3 Pet. 433, 448 (1834), as follows:

> "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings."

The same judge previously said in *United States* v. *Wonson,* 1 Gall. 5, 20 (1812):

> "Now according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown;

or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decision of ages."

In the case of *Capital Traction Company* v. *Hof*, 174 U.S. 1, 7 (1889), the Court said:

"A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that 'no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law,' had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States.

"This conclusion has been established, and 'the rules of the common law' in this respect clearly stated and defined, by judicial decisions."

The word "re-examine" as used in the Constitutional Amendment has therefore come to have the meaning "redetermine." Of course the court, under the rules of the common law of England, could re-examine the evidence, in the ordinary sense of the word, to see whether a new trial should be granted.

Cf. *Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463, 465 (1930, C.C.A. 2).

But it could not redetermine any fact found by the jury, whether that fact related to the damages or any other issue of the case.

In time there grew up what has been referred to by eminent English judges as "the somewhat unconstitutional proceeding" (see [1905] A.C. 119) of the courts in refusing to give the plaintiff judgment on a verdict when the judge thought the damages excessive. The plaintiff was, however, given his choice of taking a new trial or accepting judgment for a less amount.

It soon became evident that there was as much a miscarriage of justice when the damages were too small as when they were too large, and the right to grant a new trial for the former reason also became established. But the review of the English cases earlier in this brief shows that the English judges never attempted to give the plaintiff the "Hobson's choice" of accepting an amount of damages determined by the court or the admittedly inadequate award of the jury. While, therefore, under the rules of the common law of England, the trial judge could refuse to receive the verdict and send the case to a new jury, he could never, without at least the plaintiff's consent, enter judgment for any sum other than that determined by a jury.

Cf. *Kennon* v. *Gilmer,* 131 U.S. 22, 29, *supra.*

It may be thought that some of the cases cited in connection with this part of the argument, though they would be controlling if the verdict had been increased over the objection of the defendant, are distinguishable because the plaintiff is the objecting party. But we recur to the issue before the court, which is the power of the District Court to make the order and enter the judgment complained of.

This power is circumscribed by the federal statute which requires that "the trial of issues of fact in the district

courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy shall be by jury" (U.S.C. Title 28, section 770). In determining any issue of fact where a jury trial has not been waived, the court acts in excess of its authority and in violation of the statute.

Morgan's Executor v. *Gay,* 19 Wall. 81, 83 (1873).
Baylis v. *Travellers' Ins. Co.,* 113 U.S. 316, *supra.*

The second part of the Seventh Amendment, as we have seen, also places a strict limitation on the power of the court. If the court acts in excess of its powers, its action is erroneous in law and must be reversed. Whether the constitutional or the statutory limitation be considered, it has been shown that the trial judge exceeded his authority in making the order in question. The net result of his action has been to prevent the respondent from having an impartial jury correctly assess the damages which the respondent sustained as a result of the petitioner's negligence.

Under the Constitution "Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted."

Capital Traction Co. v. *Hof,* 174 U.S. 1, at 16, *supra.*
United States v. *1363 Bags of Merchandise,* 2 Sprague, 84, 87 (1863).

As the order denied rights secured to the respondent by the Constitution, the judgment was properly reversed by the Circuit Court of Appeals and its ruling should be affirmed.

In answer to the objection that the order of the trial judge violated rights of the respondent secured by the Seventh

Amendment, the dissenting judge and the petitioner stress a supposed analogy between that order and the practice of remittiturs.

The reasoning of the dissenting opinion is as follows: Since the use of remittiturs implies power in the trial judge to determine the upper limit of reasonable damages (R. 47), there is a lower limit which is equally for him to determine. Admittedly, on the lower side the question is complicated by the possibility of compromise on the issue of liability as an explanation of the inadequate award. Assuming that in remittitur cases the intention of the jury is to give the highest damages legally possible, the trial judge should have power to state the minimum reasonable amount, as in remittitur cases he can fix the maximum. Asserting that neither in the remittitur case nor in the case at bar has the jury determined the amount of damages, the opinion concludes: "But this does not prevent remittiturs and, as I have said, I can see no distinction affecting the powers of the trial judge, between them and the order made in this case—which might perhaps be termed an 'additur' " (R. 48).

The petitioner's argument is somewhat different: Remittiturs are justified, he says (page 15), on the ground that the defendant cannot complain because he is getting something at the hands of the court which he has asked the court as a matter of discretion to give him, and the plaintiff has assented. The plaintiff is the prevailing party; the motion is made by the losing party; the act of the court, by whatever preliminaries it is preceded, is essentially a denial of the motion, and is founded in the discretion of the court. As a matter of everyday language, the petitioner continues, the respondent in the case at bar, dissatisfied with the amount of the jury's award, cannot be said to be the prevailing party (page 16). By this test, he concludes, the respondent cannot complain of the court's order.

There can be no quarrel with the assertion by the dissenting judge that the trial judge has power to determine the lower, as well as the upper, limit of reasonable damages, provided that the power is limited to determining whether a verdict should or should not be disturbed. But the assumption that the jury, where damages are excessive, intended to give the highest damage legally permissible, is not necessarily sound. All that the trial judge can be assumed to know is that the damages are excessive in view of the evidence. So long as it does not appear that the excess was caused by passion and prejudice, it is not for an appellate court to speculate on the reasons for it. Even less sound is the converse assumption, that where the damages are inadequate the jury intended to give the lowest amount legally permissible. The dissenting opinion admits that on the lower side the question is complicated by the possibility that compromise regarding liability explains the small award. This possibility cannot be ignored, since, if it were true, the verdict would be tainted and open to objection by both parties. *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Moquin,* 283 U.S. 520. But compromise and intent to give the smallest possible amount are not the only possible assumptions. If the inadequacy be explained by mistake or ignorance, as well it might, this would apply to mistake or ignorance regarding what constituted a generous as well as a niggardly award.

The assumption that the jury intended to give the lowest possible amount being eliminated, the argument that the plaintiff is not aggrieved when given that amount by the judge instead of a new trial, fails. If the amount awarded be admittedly inadequate, who but another jury can, within the spirit and letter of the Seventh Amendment, determine what amount a jury, within reasonable limits, would consider proper?

The petitioner's reasoning is objectionable at the outset, in so far as it is based upon the assumption that the respondent, for the purpose of the case at bar, must be said to be the "losing party," and therefore, as loser, cannot complain of the exercise of the trial court's discretion. Certainly the respondent cannot accurately be said to be the "losing party" to any degree comparable to the defendant in the remittitur cases. In the latter cases the defendant has nothing to lose and everything to gain, while in this case the respondent has prevailed to the extent of establishing liability and is prepared to pay a substantial price to have the verdict set aside.

But without extending the discussion of this argument, it may be pointed out that the "losing party" test is by no means infallible. Once again, we repeat the principle that, under the Constitution, "Each party, the losing as well as the winning, has a right to the legitimate trial by jury." (*Capital Traction Co.* v. *Hof*, 174 U.S. 1, 16, *supra*). Moreover, the very ground upon which the petitioner distinguishes the *Shanahan case* (193 Mass. 412, *supra*) is that in that case the plaintiff was even more a loser than in the case at bar, since the jury's verdict had been adverse on liability as well as on damages. Certainly, it cannot be argued that the plaintiff there was aggrieved by having the trial judge change the jury's unfavorable verdict to a favorable one on liability. Yet, admittedly, that change is the only detail in which that case differs from the case at bar. The *Shanahan* case, therefore, is authority squarely against the petitioner's "losing party" argument.

But, we submit, neither the dissenting judge's method of analogy, based on assumption as to the jury's intention, nor the petitioner's, based on the "losing party" theory, recognizes the fundamental differences between remittiturs and the order in the case at bar.

The fact is that in remittitur cases, as the majority opinion in the Circuit Court of Appeals points out (R. 45), the jury has already awarded an amount including, but in excess of, the amount which the trial judge deems reasonable. In terms of figures, if the jury has awarded $5000 ($3000 plus $2000) and the trial judge decides that $3000 is the highest amount that could be found to be reasonable, judgment, on remittitur, is entered for a sum which the jury has already included in its finding: The sum is known from its inclusion in the jury's express verdict. But no such contention can be made for the judgment entered by the District Court in the case at bar. The jury, incorrectly, has failed to find more than $500. But to inquire how much more *they* would have found above that amount is to speculate about something that has never actually happened.

The dissenting opinion (R. 48) places considerable emphasis upon *Arkansas Valley Company* v. *Mann,* 130 U.S. 69 (1889), and kindred cases upholding the constitutionality of remittiturs.

That there is, however, no necessary progression from approving remittiturs to approving the action taken here by the District Court is apparent from the fact that, in all of the states where the question has been raised and decided contrary to such a practice, remittiturs are recognized and approved, either by decision or by statute.

Shanahan v. *Boston & Northern Street Ry. Co.,* 193 Mass. 412, *supra.*

Phillips v. *Granger,* 134 Mass. 475, *supra.*

Werner v. *Bryden,* 84 Cal. App. 472, *supra.*

Carpentier v. *Gardner,* 29 Cal. 160, 165 (1865).

Lorf v. *City of Detroit,* 145 Mich. 265, *supra.*

Goldsmith v. *Detroit, Jackson & Chicago Railway,* 165 Mich. 177, *supra.*

See *Risch* v. *Lawhead,* 211 Wis. 270, *supra.*

Were there a logical conflict with reference to the constitutional question between the *Arkansas Valley* case and the cases just cited, the federal case would of course govern. But no conflict exists. One may question the authority upon which the *Arkansas Valley* decision is based—for example: although the question was whether the practice of remittiturs was sanctioned at the time of the adoption of the Constitution of the United States, the earliest case cited is a decision by Mr. Justice Story at *nisi prius* in 1822, *Blunt* v. *Little,* 3 Mason, 102, in which, however, there is no discussion of the problem, and no citation of authority whatever —nevertheless, the constitutionality of remittiturs has been too long settled to be brought into question again.

Constitutional interpretation is often as much a matter of history as of logic. That, in the final analysis, is the decisive explanation why, if all other distinction between remittitur and "additur" fails, the one practice may be permitted and the other condemned by the Constitution.

We accept the premise upon which the *Arkansas Valley* case rests, namely, that remittiturs were known to the English common law at or about the time of the adoption of the Constitution. (The decision of course came many years before *Watt* v. *Watt,* [1905] A.C. 115, in which finally they were condemned. And see *Pickwood* v. *Wright,* 1 H. Bl. 642 (1791).)

Resting on this premise, the practice of remittiturs satisfies the Seventh Amendment. But orders of the kind made by the District Court in the case at bar were not known to the common law. They, therefore, do not satisfy the Seventh Amendment. It cannot possibly be said that such orders relate only to matters of practice when they are so subversive of the rights of the parties. And there is no inconsistency between the reasoning in the *Arkansas Valley* case and that which the respondent asks this Court to adopt.

Search into the cases on remittiturs revealed to counsel no authority for the apparently novel order by the District Court. Neither the petitioner nor the dissenting judge cites such authority. We believe none exists. To repeat here the discussion of the English cases (see pages 12-16, *supra*) would serve no useful purpose, so we limit ourselves now to pointing out that the sole reference in the dissenting opinion to English law in the seventeenth and eighteenth centuries, Buller's Nisi Prius (7th ed.) (1817), p. 21*a*, relates only to the cases of mayhem which have already been distinguished and were obviously of a quasi-criminal procedure.

This last, the historical, distinction between the order in the case at bar and remittiturs is the unanswerable reason why, as a matter of constitutional interpretation, practices which in superficial detail are similar, nevertheless fall on opposite sides of the line.

For the reasons given above we believe that the Circuit Court of Appeals justifiably decided that the respondent was denied the right to trial by jury guaranteed by the Constitution of the United States. This right required the determination of all issues of fact by the proper verdict of a jury; it required as well that no fact so determined should be otherwise re-examined than according to the rules of the common law. Decisions of this Court and of lower federal courts on analogous cases have made clear that interference with a jury's verdict by the trial and appellate courts will not be countenanced unless authorized by sound authority. The attempt by the petitioner and by the dissenting judge to find such authority, by analogy to remittiturs, or otherwise, fails because the analogy does not exist, either logically or historically.

Conclusion.

We respectfully submit that the decision of the Circuit Court of Appeals for the First Circuit, reversing the judgment of the District Court and remanding the case to that court for further proceedings not inconsistent with its opinion, should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 78.—October Term, 1934.

David G. Dimick, Petitioner, *vs.* Peter Schiedt.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 7, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action brought by respondent (plaintiff) against petitioner (defendant) in the federal district court for the district of Massachusetts to recover damages for a personal injury resulting from the alleged negligent operation of an automobile on a public highway in Massachusetts. The jury returned a verdict in favor of respondent for the sum of $500. Respondent moved for a new trial on the grounds that the verdict was contrary to the weight of the evidence, that it was a compromise verdict, and that the damages allowed were inadequate. The trial court ordered a new trial upon the last named ground, unless petitioner would consent to an increase of the damages to the sum of $1500. Respondent's consent was neither required nor given. Petitioner, however, consented to the increase, and in accordance with the order of the court a denial of the motion for new trial automatically followed. Respondent appealed to the circuit court of appeals, where the judgment was reversed, the court holding that the conditional order violated the Seventh Amendment of the federal Constitution in respect of the right of trial by jury. 70 F. (2d) 558. That court recognized the doctrine, frequently stated by this court, that in the case of an excessive verdict it is within the power of the trial court to grant defendant's motion for a new trial unless plaintiff remit the amount deemed to be excessive, but held that the trial court was without power to condition the allowance of plaintiff's motion for a new trial upon the refusal of defendant to consent to an increase in the amount of damages.

The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,

and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Sec. 269 of the Judicial Code, as amended, U. S. C. Title 28, § 391, confers upon all federal courts power to grant new trials "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law . . ."

In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Thompson* v. *Utah,* 170 U. S. 343, 350; *Patton* v. *United States,* 281 U. S. 276, 288. A careful examination of the English reports prior to that time fails to disclose any authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount fixed by the verdict of a jury in an action at law, with certain exceptions.

1. In actions for mayhem, there are numerous ancient cases to be found in the Year Books, and occasional cases at a somewhat later period, in which the right of the court to increase damages awarded plaintiff, *super visum vulneris,* is recognized. We deem it unnecessary to catalogue or review these cases. Many of them are referred to in 2 Bacon's Abridgment (7th Ed.) 611, and Sayer's Law of Damages (1770), p. 173 *et seq.* The last case called to our attention or that we have been able to find that recognized the rule is that of *Brown* v. *Seymour* (1742), 1 Wils. 5, where the court, while conceding its power to increase damages upon view of the party maimed, refused to exercise it, holding the damages awarded were sufficient. We have found no case where the power was exercised affirmatively since *Burton* v. *Baynes* (1733), reported in Barne's Practice Cases, 153, where the court, upon view of the injury, increased the damages from £11, 14 s., to £50. The power of the trial court to increase damages in such cases was seldom exercised; and it seems quite clear, from an examination of the decisions and of the English Abridgments, that the generally approved practice confined its exercise to the court sitting *en banc.* Moreover, the application for the increase was made by the plaintiff, considered upon a view of his wound, and, when favorably acted upon, granted absolutely and not as a condition upon which

to base a denial of a new trial. Indeed, the practice of granting new trials in such cases did not come into operation until a later date. In any event, the rule was obsolete in England at the time of the adoption of the Constitution; and we are unable to find that it ever was acted upon or accepted in the colonies, or by any of the federal or state courts since the adoption of the Constitution. It was expressly rejected in an early case in South Carolina. *McCoy* v. *Lemon,* 11 Rich. 165. There, the plaintiff, as a result of an altercation with the defendant, lost an eye and the use of one thumb. The jury returned a verdict for $30. The trial court, although conceding the inadequacy of the damages, held that no court possessed the power to bring about an increase or decrease of the amount found by a jury in any other way than by granting a new trial. The Court of Appeals sustained the trial court. "Not a single case", the appellate court said, "has been found in any book of American reports in support of the present motion, notwithstanding the great research displayed by counsel. Neither has there been, for a period of more than a century, any recognition of the rule by any adjudged case in England to which we have been able to procure access." After pointing out the jealous regard of the American people, as evidenced by constitutions and legislation, for the right of jury trial, the court said that the judgment of the jury had been incorporated as an indispensable element in the judicial administration of the country; that in all cases sounding in damages, these damages must be assessed by the jury and not by the court independently thereof; and that where the verdict was excessive or trifling, the remedy was to submit the case to the judgment of another jury. In Mayne's Treatise on Damages (9th Ed.), the first edition of which appeared in 1856, after referring to the long current of English decisions in respect of the power of the court to increase damages in mayhem cases, the author (p. 571) said he was not aware of an instance in which such a jurisdiction had been exercised in modern times. And see *Union Pacific Railway Co.* v. *Botsford,* 141 U. S. 250, 252.

2. The power of the court to increase or diminish damages assessed upon a writ of inquiry was likewise upheld; but this upon the ground that the justices might themselves have awarded damages without the writ, and the inquisition, therefore, was nothing more than an inquest for their information. Sayer's Law of Damages, 194; *Beardmore* v. *Carrington,* 2 Wils. 244, 248; Brooke's

New Cases, March's Translation, 56-57; 2 Bacon's Abridgement (7th Ed.), 612. But even this rule seems long since to have fallen into disuse, the more modern practice being to award a new writ of inquiry in all cases in which the court would award a new trial. Mayne's Treatise on Damages, 572, 573, citing Chitty's Practice, 14th ed., p. 1326.

3. So it was held in some of the old cases that where the amount of plaintiff's demand was certain, as, for example, in an action of debt, the court had authority to increase or abridge the verdict of the jury. Mayne's Treatise on Damages, 571; Sayer's Law of Damages, 177.

In *Beardmore* v. *Carrington, supra,* decided in 1764, the court reviewed the subject and reached the conclusion that the English courts were without power to either increase or abridge damages in any action for a personal tort, unless in the exceptional cases just noted. The decision is most instructive, as a brief quotation will show. The italics are in the original.

"It is clear", the court said at p. 248, "that the practice of granting new trials is *modern,* and that courts anciently never exercised this power, but in some particular cases they corrected the damages from evidence laid before them. There is great difference between cases of damages which [may] be certainly seen, and such as are ideal, as between *assumpsit, trespass for goods* where the sum and value may be measured, and actions of *imprisonment, malicious prosecution, slander and other personal torts,* where the damages are matter of opinion, speculation, ideal; there is also a difference between a principal verdict of a jury, and a writ of inquiry of damages, the latter being only an inquest of office to inform the conscience of the court, and which they might have assessed themselves without any inquest at all; only in the case of *maihem,* courts have in all ages interposed in that single instance only; as to the case of the writ of inquiry in the year-book of *H.*4, we doubt whether what is said by the court in that case be right, *That they would abridge the damages unless the plaintiff would release part thereof,* because there is not one case to be found in the year-books wherever the court abridged the damages after a principal verdict, and this is clear down to the time of *Palmer's Rep.* 314. much less have they interposed in increasing damages, except in the case of *maihem*; . . ."

Sayer, writing between 1765 and 1770 (Sayer's Law of Damages, 173) says that the power of increasing or abridging damages which have been assessed by the jury "has not for many years been exercised by courts in any action except in an action for a corporal

hurt"; by which he means, as appears further along, in cases of mayhem. Mayne, in the treatise already cited says (p. 571) that it was always admitted "that in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." Recent English decisions fully confirm this view in respect of the common law rule as it existed at the time of the adoption of the Constitution. Thus Mayne (p. 580) says:

'When an excessive verdict is given, it is usual for the judge to suggest to counsel to agree on a sum, to prevent the necessity of a new trial. In the absence of agreement the Court has no power to reduce the damages to a reasonable sum instead of ordering a new trial. It would seem also from what was said in the case in which this was recently decided, that where the damages are too small, the Court cannot with the defendant's consent increase them, if the plaintiff asks for a new trial."

It is true that *Belt* v. *Lawes,* L. R. 12 Q. B. Div. 356, upheld the authority of the court to deny a new trial upon the consent of the plaintiff to reduce the damages to an amount which the court would consider not excessive had they been given by the jury; and that the Master of the Rolls in his opinion declared that he was by no means prepared to say that the court might not refuse a new trial if a defendant would agree that the damages should be larger. But this doctrine was expressly repudiated by the House of Lords in *Watt* v. *Watt,* L. R. [1905] A. C. 115; and *Belt* v. *Lawes* was definitely overruled.

In the *Watt* case, the principal opinion (pp. 119-120) pointed out that the notion that the court with the consent of the plaintiff could reduce the amount of the damages probably arose from the fact that in the old cases the courts had "adopted the somewhat unconstitutional proceeding of refusing to give the plaintiff judgment unless he would consent to reduce his claim to what ought to be considered reasonable"; that this indirect method shows that the plaintiff's assent was required; and that, since the defendant was not likely to refuse his assent to a proceeding intended for his benefit, the theory of the cases seems to have been that the right of the court to interfere with the verdict depended upon the assent of both parties. It was conceded in the opinions delivered to the House that there had been a certain amount of practice in accordance with the course complained of, but in principle, it was said, this practice was indefensible, and that no reasoned vindication of

it had been found. The prevailing opinions in *Barbour & Co.* v. *Deutsche Bank,* L. R. [1919] A. C. 304, while distinguishing the case then under review, are (as all the opinions are) in full accord with the decision in the *Watt* case. Lord Phillimore, in the course of his opinion (p. 335) characterized that decision as one of inconvenient rigor but nevertheless unimpeachable and logical. The principle established, he said, was this:

"Where damages are at large and the Court of Appeal is of opinion that the sum awarded is so unreasonable as to show that the jury has not approached the subject in a proper judicial temper, has admitted considerations which it ought not to have admitted, or rejected or neglected considerations which it ought to have applied, it is the right of the party aggrieved to have a new trial. He is not to be put off by the Court saying that it will form its opinion as to the proper sum to be awarded, and reduce or enlarge the damages accordingly. He is entitled to an assessment by a jury which acts properly. He is not to be put off by a composite decision, or I might describe it as a resultant of two imperfect forces —an assessment partly made by a jury which has acted improperly and partly by a tribunal which has no power to assess."

From the foregoing and from many other English authorities which we have examined but deem it unnecessary to cite, we conclude that, while there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions such as that here under consideration.

We could well rest this opinion upon that conclusion, were it not for the contention that our federal courts from a very early day have upheld the authority of a trial court to deny a motion for new trial because damages were found to be excessive, if plaintiff would consent to remit the excessive amount, and that this holding requires us to recognize a similar rule in respect of increasing damages found to be grossly inadequate. There is a decision by Mr. Justice Story, sitting on circuit, authorizing such a remittitur, as early as 1822. *Blunt* v. *Little,* 3 Mason 102. There, the jury returned a verdict for $2,000 damages, suffered as a result of a malicious arrest. Defendant moved for a new trial on the ground that the damages were excessive. The court asserted its power to grant a new trial upon that ground, but directed that the cause should be submitted to another jury unless plaintiff was willing to remit $500 of the damages. This view of the matter was accepted

by this court in *Northern Pacific R. R. Co.* v. *Herbert,* 116 U. S. 642, 646-7, and has been many times reiterated. See, for example, *Arkansas Cattle Co.* v. *Mann,* 130 U. S. 69, 73; *Kennon* v. *Gilmer,* 131 U. S. 22, 29; *Koenigsberger* v. *Richmond Silver Min. Co.,* 158 U. S. 41. 52; *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307, 312; *Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 103-5.

Since the decision of Mr. Justice Story in 1822, this court has never expressed doubt in respect of the rule, and it has been uniformly applied by the lower federal courts. It is, however, remarkable that in none of these cases was there any real attempt to ascertain the common law rule on the subject. Mr. Justice Story, in the *Blunt* case, cited two English cases antedating the Constitution in support simply of his conclusion that the court had power to grant a new trial for excessive damages, and thereupon announced without more that unless the plaintiff should be willing to remit $500 of his damages, the cause would be submitted to another jury. For the latter conclusion, no authority whatever was cited. The plaintiff remitted the amount, and the motion was overruled. The opinion in the *Herbert* case was delivered by Mr. Justice Field. Upon the question now under consideration, the opinion does no more than declare that the exaction, as a condition of refusing a new trial, that plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court, in support of which two American state cases and the *Blunt* case are cited. The common law in respect of the matter is not referred to. The state cases cited are equally silent in respect of the common law rule.

The nearest approach to a reasoned opinion on the subject in any of the decisions is found in *Arkansas Cattle Co.* v. *Mann, supra.* In that opinion, the court states the contention to be that to make the decision of the motion for new trial depend upon a remission of part of the verdict is in effect a reexamination by the court in a mode not known at the common law of facts tried by the jury, and therefore a violation of the Seventh Amendment. The court decided against this contention upon the authority of the *Blunt* case, the *Herbert* case, and certain American state decisions. English cases were referred to only upon the point that the court had authority to set aside the verdict and grant a new trial where the damages are palpably or outrageously excessive. No attempt was made to seek the common law rule, in respect of the precise contention which was made, by an examination of the English

decisions or of the English practice prior to the adoption of the Constitution.

In the last analysis, the sole support for the decisions of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the federal Constitution, which we have been able to find.

In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

Nevertheless, this court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land. Compare *Judson* v. *Gray,* 11 N. Y. 408, 412.

That rule applies with peculiar force to the present case, since, accepting *Arkansas Cattle Co.* v. *Mann, supra,* and like cases, as settling the precise question there involved they do not conclude the question here presented. That is to say, the power to conditionally increase the verdict of a jury does not follow as a necessary corollary from the power to conditionally decrease it. As the court below correctly pointed out, in the case of a conditional remittitur, "a jury has already awarded a sum in excess of that fixed by the court as the basis for the remittitur, which at least finds some support in the early English practice; while in the second case, no jury has ever passed on the increased amount, and the practice has no precedent according to the rules of the common law."

The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), " . . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms". With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton* v. *United States*, 281 U. S. 276, 312.

The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to

the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."

It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk* v. *United States,* 290 U. S. 371. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124.

It is worthy of note that while for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no federal court, so far as we can discover, has ever undertaken similarly to increase the damages, although there are numerous cases where motions for new trial have been made and granted on the ground that the verdict was inadequate. See, for example, *Carter* v. *Wells, Fargo & Co.,* 64 Fed. 1005; *Usher* v. *Scranton Ry. Co.,* 132 Fed. 405; *Glenwood Irr. Co.* v. *Vallery,* 248 Fed. 483; *United Press Ass'ns* v. *National Newspapers Ass'n,* 254 Fed. 284; *Stetson* v. *Stindt et al.,* 279 Fed. 209. This, it is true, is but negative evidence; but it is negative evidence of more than ordinary value. For, when we consider that during the great length of time mentioned, the federal courts were constantly applying the rule in respect of the remission of excessive damages, the circumstance that the practice here in question in respect of inadequate damages was never followed or, apparently, its approval even suggested, seems highly significant as indicating a lack of judicial belief in the existence of the power.

State decisions in respect of the matter have been brought to our attention and have received consideration. They embody rulings both ways. A review of them we think would serve no useful purpose.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 78.—October Term, 1934.

David G. Dimick, Petitioner, *vs.* Peter Schiedt. } On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 7, 1935.]

Mr. Justice Stone.

I think the judgment should be reversed.

What the trial court has done is to deny a motion for a new trial, for what seemed to it a good reason: that the defendant had given his binding consent to an increased recovery, which the court thought to be adequate, and thus to remove any substantial ground for awarding a new trial. In denying the motion the trial judge relied on two rules of the common law which have received complete acceptance for centuries. One is that the court has power to act upon a motion to set aside the verdict of a jury because inadequate or excessive, and in its discretion to grant or deny a new trial. *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31; *Wilson* v. *Everett*, 139 U. S. 616, 621; *Lincoln* v. *Power*, 151 U. S. 436, 438. The other, which is implicit in the first, is that it has power to determine, as a matter of law, the upper and lower limits within which recovery by a plaintiff will be permitted and the authority to set aside a verdict which is not within those limits. *Arkansas Valley Land & Cattle Co.* v. *Mann*, 130 U. S. 69, 74; cf. *Southern Ry. Co.* v. *Bennett*, 233 U. S. 80, 87.

As a corollary to these rules is the further one of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. *Railroad Co.* v. *Fraloff, supra,* 31; *Wabash Ry. Co.* v. *McDaniels,* 107 U. S. 454, 456; *Fitzgerald & Mallory Const. Co.* v. *Fitzgerald,* 137 U. S. 98, 113; *Wilson* v. *Everett, supra,* 621; *Lincoln* v. *Power, supra,* 438; *Luckenbach*

S. S. Co. v. *United States,* 272 U. S. 533, 540. This is but a special application of the more general rule that an appellate court will not reexamine the facts which induced the trial court to grant or deny a new trial.[1] *Barr* v. *Gratz,* 4 Wheat. 213, 220; *The Abbottsford,* 98 U. S. 440, 445; *Railroad Co.* v. *Fraloff, supra,* 31; *Terre Haute & Indiana Ry. Co.* v. *Struble,* 109 U. S. 381, 384, 385; *Fishburn* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 137 U. S. 60, 61; *Ayers* v. *Watson,* 137 U. S. 584, 597; *Wilson* v. *Everett, supra,* 621; *Luckenbach S. S. Co.* v. *United States, supra,* 540.

If the effect of what is now decided is to liberalize the traditional common law practice so that the denial of a motion for a new trial, made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the change need not be regarded as unwelcome, even though no statute has authorized it. But the question remains whether, in exercising this power of review, the trial judge should be reversed.

The decision of the Court is rested on the ground that the Constitution prohibits the trial judge from adopting the practice. Accordingly, I address myself to the question of power without stopping to comment on the generally recognized advantages of the practice as a means of securing substantial justice and bringing the litigation to a more speedy and economical conclusion than would be possible by a new trial to a jury, or the extent to which that or analogous practice has been adopted and found useful in the courts of the several states. See Correction of Damage Verdicts by Remittitur and Additur, 44 Yale Law J. 318. The question is a narrow one: whether there is anything in the Seventh Amendment or in the rules of the common law, as it had developed before the adoption of the Amendment, which would require a federal appellate court to set aside the denial of the motion merely because the particular reasons which moved the trial judge to deny it are not shown to have similarly moved any English judge before 1791.

The Seventh Amendment commands that "in suits at common law," the right to trial by jury shall be preserved and that "no fact tried by a jury shall be otherwise re-examined by any court of the United States, than according to the rules of the common

[1]The power of the English appellate courts to review such action has been enlarged by statute, and the motion itself must be made to the Court of Appeal. Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77, Order 58; Rules of the Supreme Court of Judicature, Order 39. See Fairmount Glass Works *v.* Cub Fork Coal Co., 287 U. S. 474, 482, note 9.

law." Such a provision of a great instrument of government, intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason this Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, see *Parsons* v. *Bedford,* 3 Pet. 433, 446, and to safeguard the jury's function from any encroachment which the common law did not permit.

Thus interpreted, the Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791.

Thus this Court has held that a federal court, without the consent of the parties, may constitutionally appoint auditors to hear testimony, examine books and accounts and frame and report upon issues of fact, as an aid to the jury in arriving at its verdict, *Ex parte Peterson,* 253 U. S. 300; it may require both a general and a special verdict and set aside the general verdict for the plaintiff and direct a verdict for the defendant on the basis of the facts specially found, *Walker* v. *New Mexico & Southern Pacific R. Co.,* 165 U. S. 593; and it may accept so much of the verdict as declares that the plaintiff is entitled to recover, and set aside so much of it as fixes the amount of the damages, and order a new trial of that issue alone, *Gasoline Products Co., Inc.* v. *Champlin Refining Co.,* 283 U. S. 494. Yet none of these procedures was known to the common law. In fact, the very practice, so firmly imbedded in federal procedure, of making a motion for a new trial directly to

the trial judge, instead of to the court *en banc,* was never adopted by the common law.[2] But this Court has found in the Seventh Amendment no bar to the adoption by the federal courts of these novel methods of dealing with the verdict of a jury, for they left unimpaired the function of the jury, to decide issues of fact, which it had exercised before the adoption of the Amendment. Compare *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace,* 288 U. S. 249, 264.

If we apply that test to the present case it is evident that the jury's function has not been curtailed. After the issues of fact had been submitted to the jury, and its verdict taken, the trial judge was authorized to entertain a motion to set aside the verdict and, as an incident, to determine the legal limits of a proper verdict. A denial of the motion out of hand, however inadequate the verdict, was not an encroachment upon the province of the jury as the common law defined it. It would seem not to be any the more so here because the exercise of the judge's discretion was affected by his knowledge of the fact that a proper recovery had been assured to the plaintiff by the consent of the defendant. Thus the plaintiff has suffered no infringement of a right by the denial of his motion. The defendant has suffered none because he has consented to the increased recovery, of which he does not complain.

It is upon these grounds, as well as the further one that the denial of a new trial may not be reviewed upon appeal, see *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* 75, that this Court has upheld the practice of the remittitur. Recognized more than a century ago by Mr. Justice Storey in *Blunt* v. *Little,* 3 Mason, 102, 107, it has been consistently used in the federal trial courts,

[2]In England, before the adoption of the Seventh Amendment, the motion was made not to the trial judge but to the court sitting *en banc.* Blackstone's Commentaries, v. 3, p. 391; Tidd's Practice, v. 2, pp. 819-821. By the Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77, Order 58, see Order 39 of Rules of Supreme Court of Judicature, the motion was required to be made to the Court of Appeal, from whose decision an appeal lies. The original organization of the federal courts was capable of use in such a fashion that the motion could be made to the circuit court, something in the nature of a court *en banc,* but no such practice developed. Judiciary Act of 1789, c. 20, §§ 4, 17, 1 Stat. 73, 74, 83; Hinton, Power of Federal Appellate Court to Review Ruling on Motion for New Trial, 1 Univ. of Chicago Law Rev. 111, 113.

and as consistently upheld in this Court. *Northern Pacific Railroad Co.* v. *Herbert,* 116 U. S. 642, 646, 647; *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* 72-76; *Kennon* v. *Gilmer,* 131 U. S. 22, 29, 30; *Clark* v. *Sidway,* 142 U. S. 682, 690; *Lewis* v. *Wilson,* 151 U. S. 551, 555; *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52; *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307, 312; cf. *Gila Valley R. Co.* v. *Hall,* 232 U. S. 94, 104, 105; *Tevis* v. *Ryan,* 233 U. S. 273, 290; *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 334. In *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* at page 74, in considering at length the constitutional question, this Court said:

"The practice which this court approved in *Northern Pacific Railroad* v. *Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. *Ducker* v. *Wood,* 1 T. R. 277; *Hewlett* v. *Crutchley,* 5 Taunt. 277, 281; authorities cited in Sedgwick on Damages, 6th ed. 762, note 2. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before the passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint."

See also *Kennon* v. *Gilmer, supra,* 29; *Clark* v. *Sidway, supra,* 690; *Gila Valley R. Co.* v. *Hall, supra,* 104; *Belt* v. *Lawes,* L. R. 12 Q. B. D. 356, 358.

All that was there said is equally applicable to the present denial of a motion to set aside the verdict as ~~excessive~~ inadequate. The defendant, who has formally consented to pay the increased amount, because the court, staying its hand, has left the verdict undisturbed, as it lawfully might have done if the defendant had refused to pay more than the verdict. The fact that in one case the recovery is less than the amount of the verdict, and that in the other it is greater, would seem to be without significance. For in neither

does the jury return a verdict for the amount actually recovered, and in both the amount of recovery was fixed, not by the verdict but by the consent of the party resisting the motion for a new trial.

The question with which we are now concerned—what considerations shall govern an appellate review of this discretionary action of the trial court—is one unknown to the common law, which provided for no such review. We are afforded but a meager and fragmentary guide if our review is to be controlled by the Seventh Amendment, read as though it had incorporated by reference the particular details of English trial practice exhibited by the law books in 1791. We know that as late as the middle of the eighteenth century the English courts, by directing an increase of the judgment where the verdict was thought to be inadequate, had exercised an extraordinary measure of control over the verdict of the jury in cases of mayhem and battery; and that the practice of denying a new trial upon a remittitur had received some recognition in the English courts. *Belt* v. *Lawes, supra,* 359; *Watt* v. *Watt,* [1905] A. C. 115, 122. But in no recorded case does it appear that any English judge had considered the possibility of denying a new trial where the defendant had consented to increase the amount of recovery.

If our only guide is to be this scant record of the practice of controlling the jury's verdict, however fragmentary the state of its development at this period, and if we must deny any possibility of change, development or improvement, then it must be admitted that search of the legal scrap heap of a century and a half ago may commit us to the incongruous position in which we are left by the present decision: a federal trial court may deny a motion for a new trial where the plaintiff consents to decrease the judgment to a proper amount, but it is powerless to deny the motion if its judgment is influenced by the defendant's consent to a comparable increase in the recovery.

But I cannot agree that we are circumscribed by so narrow and rigid a conception of the common law. The Judiciary Act of 1789, c. 20, 1 Stat. 73, which impliedly adopted the common law rules of evidence for criminal trials in federal courts, and which gave to the federal courts jurisdiction of equity as it had then been developed in England, and the state constitutions which adopted the common law as affording rules for judicial decision, have never

been construed as accepting only those rules which could then be found in the English precedents. When the Constitution was adopted, the common law was something more than a miscellaneous collection of precedents. It was a system, then a growth of some five centuries, to guide judicial decision. One of its principles, certainly as important as any other, and that which assured the possibility of the continuing vitality and usefulness of the system, was its capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it. "This flexibility and capacity for growth and adaptation is," as the Court declared in *Hurtado* v. *California,* 110 U. S. 516, 530, "the peculiar boast and excellence of the common law." See also *Holden* v. *Hardy,* 169 U. S. 366, 385-387; *Twining* v. *New Jersey,* 211 U. S. 78, 101; *Funk* v. *United States,* 290 U. S. 371, 380-386.

This Court has recently had occasion to point out that the common law rules, governing the admissibility of evidence and the competency of witnesses in the federal courts, are not the particular rules which were in force in 1791, but are those rules adapted to present day conditions, "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." *Funk* v. *United States, supra,* 382; see also *Wolfle* v. *United States,* 271 U. S. 7, 12; *Holden* v. *Hardy, supra,* 385-387. The common law is not one system when it, or some part of it, is adopted by the Judiciary Act and another if it is taken over by the Seventh Amendment. If this Court could thus, in conformity to common law, substitute a new rule for an old one because it was more consonant with modern conditions, it would seem that no violence would be done to the common law by extending the principle of the remittitur to the case where the verdict is inadequate, although the common law had made no rule on the subject in 1791; and that we could not rightly refuse to apply to either the principle of general application, that it is competent to exercise a discretionary power to grant or withhold relief in any way which is not unjust. See *Belt* v. *Lawes, supra,* 358. Appellate federal courts, although without common law precedent, have not hesitated to resort to the remittitur where, by its use, the necessity of a new trial could justly be avoided. *Bank of Kentucky* v. *Ashley,* 2 Pet. 327, 329; *Phillips & Colby Construction Co.* v. *Seymour,* 91 U. S. 646, 656; *Hopkins* v. *Orr,* 124 U. S. 510, 514; *Washington & Georgetown R. Co.* v. *Har-*

mon, 147 U. S. 571, 590; *Hansen* v. *Boyd,* 161 U. S. 397, 411, 412. The trial judge who denies a motion for a new trial, because the plaintiff has consented to reduce or a defendant has consented to increase the amount of the recovery, does no more than when, sitting in equity, he withholds relief upon the compliance with a condition, the performance of which will do substantial justice. See *Harrisville* v. *Dickey Clay Co.,* 289 U. S. 334, 338.

To me it seems an indefensible anachronism for the law to reject the like principle of decision, in reviewing on appeal denials of motions for new trial, where the plaintiff has consented to decrease the judgment or the defendant has consented to increase it by the proper amount, or to apply it in the one case and reject it in the other. It is difficult to see upon what principle the denial of a motion for a new trial, which for centuries has been regarded as so much a matter of discretion that it is not disturbed when its only support may be a bad or inadequate reason, may nevertheless be set aside on appeal when it is supported by a good one: that the defendant has bound himself to pay an increased amount of damages which the court judicially knows is within the limits of a proper verdict.

On this question the decisions of the English courts since the adoption of the Constitution do not have the force of precedents; they are of weight only so far as they are persuasive. It is enough to say that when in 1905 the House of Lords in *Watt* v. *Watt, supra,* overruled *Belt* v. *Lawes, supra,* and terminated the practice of the remittitur, it did not comment on the fact that it was reviewing an exercise of discretion in the denial of a new trial. So far as appears, it did not consider, in the light of any legal analogy, whether the denial of the motion because of the plaintiff's consent could be deemed in any proper sense an abuse of discretion.

The Chief Justice, Mr. Justice Brandeis and Mr. Justice Cardozo concur.